(1)

No. 90-615-CFY
Status: GRANTED

Title: Rafael Peretz, Petitioner
v.
United States

Docketed:
October 10, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Brenner,Joel A.

Counsel for respondent: Solicitor General

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Entry	Date	Note	Proceedings and Orders
1	Oct 10 1990	G	Petition for writ of certiorari filed.
2	Nov 1 1990		Brief of respondent United States in opposition filed.
3	Nov 7 1990		DISTRIBUTED. November 21, 1990
4	Jan 22 1991		Petition GRANTED. limited to the following questions: 1. Does 28 U.S.C. Section 636 permit a magistrate to conduct the voir dire in a felony trial if the defendant consents? 2. If 28 U.S.C. Section 636 permits a magistrate to conduct a felony trial voir dire provided that the defendant consents, is the statute consistent with Article III? 3. If the magistrate's supervision of the voir dire in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal? **********
5	Feb 19 1991	G	Motion of petitioner for leave to proceed further herein in forma pauperis filed.
6	Feb 19 1991		Distributed. Feb. 22, 1991. (Motion to proceed further herein in forma pauperis).
7	Feb 25 1991		Motion of petitioner for leave to proceed further herein in forma pauperis GRANTED.
8	Feb 27 1991		SET FOR ARGUMENT TUESDAY, APRIL 23, 1991. (1ST CASE)
9	Feb 27 1991		Record filed.
		*	Certified copy of orginial C. A. Proceedings recieved. (Box).
10	Mar 6 1991		Brief of petitioner Rafael Peretz filed.
11	Mar 7 1991		Joint appendix filed.
12	Mar 8 1991		Lodgings received.
13	Mar 22 1991		CIRCULATED.
14	Apr 5 1991	X	Brief of respondent United States filed.
15	Apr 12 1991	X	Reply brief of petitioner Peretz filed.
16	Apr 23 1991		ARGUED.

90-615

No.: _____

Supreme Court, U.S.
FILED
OCT 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

RAFAEL PERETZ

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL A. BRENNER
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DAVID BREITBART
Of Counsel

QUESTIONS PRESENTED

1. Does this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237 (1989), which held that a federal magistrate lacks jurisdiction to preside at jury selection for a felony trial, and that a magistrate's general criminal trial jurisdiction requires a defendant's knowing, voluntary and written consent, mandate reversal of a conviction where the defendant neither consented nor objected to such an unauthorized procedure?

2. Does a federal felony defendant waive his personal right to trial before a tribunal with jurisdiction to preside merely by failing to object, where Congress has expressly required that such waivers be unequivocal, knowing, voluntary and written?

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No.:_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term: 1990

RAFAEL PERETZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioner, Rafael Peretz, respectfully requests that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on April 23, 1990.

The Court rejected petitioner's arguments that reversal of his conviction was required by this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237

(1989), and that neither his failure to object nor the "consent" of his trial counsel constituted a waiver of his right to raise that claim.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (Sifton, J.), wrote no opinion. The opinion of the United States Court of Appeals for the Second Circuit affirming appellant's conviction is reported at 904 F. 2d 34 (2d Cir. 1990), and is reprinted in the Appendix hereto at p. 1a; the opinion of the Court of Appeals denying rehearing and rehearing *en banc* is not officially reported, and is reprinted in the Appendix hereto at p. 5a.

JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1). This petition is timely because filed within 90 days of the Court of Appeals' denial of petitioner's timely petition for rehearing on July 11, 1990.

STATUTES INVOLVED

Title 28, United States Code, Section 636 (in pertinent part):

> Section 636. Jurisdiction, powers, and temporary assignment.
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial

> jurisdiction prescribed by his appointment ---
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (c) Notwithstanding any provision of law to the contrary ---
>
> > (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves ....
> >
> > (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

Title 18, United States Code, Section 3401 (in pertinent part):

> Section 3401. Misdemeanors; application of probation laws.
>
> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.
>
> (b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

Indictment 88 Cr. 434 (E.D.N.Y.) charged petitioner with violations of the controlled substances provisions of federal law.

Prior to trial, at an informal status conference, Judge Sifton asked whether there was any objection to pick the jury before a magistrate, and defense counsel responded "I would love the opportunity." Prior to beginning the jury selection process, Magistrate Amon asked petitioner's counsel if his client consented to having her select the jury, and counsel answered affirmatively. Neither before Judge Sifton nor Magistrate Amon was petitioner personally addressed nor did he personally respond.

After the Magistrate conducted the jury selection, Judge Sifton swore the panel without offering petitioner a *de-novo* review of the Magistrate's conduct of the proceeding. After a brief trial, the Magistrate-selected jury returned a verdict of guilty against petitioner. Petitioner then filed a motion to set aside the verdict on the basis of this Court's just-rendered decision in *Gomez*. However, the motion was orally denied (without a formal opinion) and petitioner was sentenced to eleven and one-quarter years in prison (which sentence he is presently serving).

On appeal, petitioner argued that *Gomez* mandated a new trial and that his failure to object to the Magistrate selecting the jury did not waive his right to make that argument on appeal.

The Court of Appeals held (1) that petitioner's failure to object was not excused by prior Court of Appeals' case-law (*United States v. Garcia,* 848 F. 2d 1324 (2d Cir. 1988), rev'd. sub. nom. *Gomez v. United States,* 109 S.Ct. 2237 [1989]) holding that magistrates had the authority to select juries with or without a

defendant's consent, citing *United States v. Musacchia,* 900 F. 2d 493 (2d Cir. 1990), and (2) that petitioner's failure to object constituted a waiver of his right to request reversal under *Gomez*, citing *United States v. Mang Sun Wong,* 884 F. 2d 1537 (2d Cir. 1989).

Petitioner sought rehearing and rehearing en banc on the ground that both *Musacchia* and *Mang Sun Wong* were in conflict with decisions of other Courts of Appeals such as *United States v. France,* 886 F. 2d 223 (9th Cir. 1989). However, the petition was denied without opinion.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT, VIA VERBAL "CONSENT" AND/OR A FAILURE TO OBJECT, (A) MAY EMPOWER A MAGISTRATE TO CONDUCT JURY SELECTION AND/OR (B) WAIVES HIS PERSONAL RIGHT TO RAISE SUCH ISSUE.

This Court recently granted Certiorari and heard oral argument in connection with the decision in *United States v. France, supra,* which decided both of the above stated issues in petitioner's favor and contrary to the decision of the Second Circuit in this case. This Court's decision in *France* will, therefore, finally resolve this issue.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT OF THE COURT OF APPEALS SUMMARILY REVERSED UNDER *GOMEZ V. UNITED STATES*. ALTERNATIVELY, THE MATTER SHOULD BE SET DOWN FOR FULL BRIEFING AND ORAL ARGUMENT. AT THE LEAST, THE PETITION SHOULD BE HELD PENDING THE DECISION IN *UNITED STATES V. FRANCE*.

Respectfully submitted,

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Dated: East Northport, New York
October 5, 1990

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April, one thousand nine hundred and ninety.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Circuit Judges,
Honorable Michael B. Mukasey,*
District Judge.

UNITED STATES OF AMERICA,
Appellee,

v.

RAFAEL PERETZ,
Defendant-Appellant.

ORDER # 89-1543

Appeal from the United States District Court for the Eastern District of New York.

---

* The Honorable Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition is denied and the judgment of said District Court be and it hereby is affirmed.

Appellant argues that his affirmative consent in the district court to jury selection before a magistrate should not now preclude his claim on appeal that such selection was constitutionally infirm under the Supreme Court's recent holding in *Gomez v. United States,* 109 S. Ct. 2237 (1989). This court has held in the aftermath of *Gomez* that explicit consent by a defendant to magistrate-supervised *voir dire* waives any subsequent challenge on those grounds. *See United States v. Mang Sun Wong,* 884 F.2d 1537, 1546 (2d Cir. 1989) (on petition for rehearing), *cert. denied,* 110 S.Ct. 1140 (1990). Appellant attempts to distinguish *Wong* on the ground that, unlike the jury there, his jury was empaneled after our decision in *United States v. Garcia,* 848 F.2d 1324, 1332 (2d Cir. 1988), *rev'd. sub. nom. Gomez v. United States,* 109 S.Ct. 2237 (1989), upholding delegation of *voir dire* to a magistrate over the defendant's objection. In light of *Garcia,* he argues, it would have been "futile" to object, and furthermore,

Appendix A
Opinion of United States Court of Appeals

consent was, under the circumstances, effectively indistinguishable from silent acquiescence. However, our recent decision in *United States v. Musacchia,* Nos. 88-1491, 88-1495, slip op. at 6805 (2d Cir. Mar. 21, 1990), completely forecloses this argument. There we rejected a similar futility argument raised by defendants who had merely failed to object to magistrate-led selection, but had not affirmatively consented. *See id.* at 6823-24. The reasoning of that decision therefore applies with even greater force to the situation presented here.

Neither of appellant's other claims of error requires reversal. He waived his lack of probable cause claim by failing to seek suppression of the evidence in question under Fed. R. Crim. P. 12. The admission of the items and statements obtained at the arrest was certainly not so plain an error as to amount to a miscarriage of justice. *See United States v. Young,* 470 U.S. 1, 16 (1985). With regard to the insufficiency claim, appellant's reliance on *United States v. Nusraty,* 867 F. 2d 759 (2d Cir. 1989), is misplaced. Unlike *Nusraty,* this case rested on far more than appellant's "mere presence" at the airport. Although the evidence against him was largely circumstantial, it was considerable and more than sufficient in light of the burden facing an appellant seeking to overturn a jury verdict on sufficiency grounds. *See, e.g., United States v. Roman,* 870 F.2d 65, 71 (2d Cir.), *cert. denied,* 109 S. Ct. 3164 (1989).

Appendix A
Opinion of United States Court of Appeals

Affirmed.

HON. JAMES L. OAKES

HON. RALPH K. WINTER,
Circuit Judges

HON. MICHAEL B. MUKASEY,
District Judge.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

Appendix B

Order of United States Court of Appeals On Petition for Rehearing With Suggestion For Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of July, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,
Appellee,

-v-

RAFAEL PERETZ,
Defendant-Appellant.

Docket No.: 89-1543

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant RAFAEL PERETZ.

Upon consideration by the panel that heard the appeal, it is

Appendix B
Order of United States Court of Appeals
On Petition For Rehearing With Suggestion For
Rehearing In Banc

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Supreme Court, U.S.
FILED
NOV 1
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-615 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
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QUESTION PRESENTED

Whether petitioner's conviction must be reversed because a magistrate presided over the jury selection at petitioner's trial, even though petitioner consented to the magistrate's role.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-615

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 904 F.2d 34 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on October 10, 1990, and is therefore one day out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, peti-

tioner was convicted of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846; possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and importation of heroin, in violation of 21 U.S.C. 952. He was sentenced to 135 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. The evidence at trial showed that petitioner participated in the importation of four kilograms of heroin from Thailand to the United States on July 12, 1988. Specifically, petitioner went to J.F. Kennedy International Airport in New York to pick up the courier of the drugs. When he was arrested, he was carrying a key to one of the suitcases in which the heroin was found. The evidence also suggested that petitioner had been in Thailand when the drugs were purchased and that he had followed the heroin back to New York. Gov't C.A. Br. 3-9.

At a pretrial conference on October 14, 1988, the district court asked petitioner whether he had any objection to holding jury selection before a magistrate. Petitioner's counsel, in petitioner's presence, replied that he "would love the opportunity." Gov't C.A. Br. 3. On December 2, 1988, the magistrate to whom jury selection had been assigned again inquired in petitioner's presence whether petitioner wished to consent to have the magistrate preside over jury selection. Petitioner's counsel again gave his express consent. Petitioner did not later object in the district court to the magistrate's role in jury selection or to any specific ruling by the magistrate during jury selection. *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-4a. It rejected (*id.* at 2a) petitioner's claim that reversal of his conviction was required by this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), which held that the Federal Magistrates Act did not authorize district courts to delegate jury selection in felony trials to magistrates and that the supervision of jury selection by a magistrate was not subject to harmless error analysis. In rejecting petitioner's *Gomez* claim, the court of appeals relied on its prior decisions in *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (1989), cert. denied, 110 S. Ct. 1140 (1990), and *United States* v. *Musacchia*, 900 F.2d 493 (1990). In *Mang Sun Wong*, the court held that a defendant's explicit consent to a magistrate's supervision of jury selection waives any subsequent challenge on that ground. In *Musacchia*, the court rejected the argument that an objection to the magistrate's presiding over jury selection would have been futile.

ARGUMENT

Petitioner contends (Pet. 6-7) that this Court's decision in *Gomez* requires reversal of his conviction even though his counsel expressly consented to jury selection by a magistrate. Petitioner also asks this Court to hold his petition and dispose of it in light of the decision in *United States* v. *France*, No. 89-1363.

1. In *Gomez*, the Court framed the issue before it as "whether presiding at the selection of a jury in a felony trial *without the defendant's consent*" is among the duties that the Magistrates Act empowers magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when "*despite the defendant's objection* and without any

meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, the precise holding of *Gomez* extends only to cases in which the district court delegated jury selection to a magistrate over the defendant's objection. As the courts of appeals found in *United States* v. *Lake*, 910 F.2d 414, 417 (7th Cir. 1990), and *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990), *Gomez* does not require reversal of a conviction where the defendant consented to the magistrate's conducting voir dire.*

This is true even though it was petitioner's counsel —not petitioner himself—who agreed to have a magistrate conduct voir dire. In general, a criminal defendant "is bound by the * * * decisions of [his] counsel." *Reed* v. *Ross*, 468 U.S. 1, 13 (1984). See also *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs"). The defendant's personal consent is needed for only a few "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (Burger, C.J.,

* No court has found to the contrary. Moreover, that conclusion is consistent with this Court's many decisions holding that a defendant may waive important rights. For example, the Court has held that a defendant may waive the right to be free from compulsory self-incrimination, see *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976), the right to counsel, see *Adams* v. *United States ex rel. McCann*, 317 U.S. 236, 275 (1942), and the right to a speedy trial, see *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972). The statutory right to have a district court preside at jury selection enjoys no special status that would preclude its waiver.

concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury [trial], or testify in one's own behalf are ultimately for the accused to make"). The decision whether to consent to the magistrate's conducting jury selection is not one of those basic decisions that cannot be made by counsel on the defendant's behalf.

2. There is no need to hold this case pending the outcome of *France*. The defendant in *France* did not consent to a magistrate's presiding over jury selection, but simply failed to object to that procedure. *France* raises the question whether a defendant's failure to object to a magistrate's supervision of jury selection may be excused on the ground that an objection would have been futile in light of controlling court of appeals decisions approving the delegation of jury selection to magistrates. That issue is not present in this case, however, because petitioner enthusiastically consented to the magistrate's role in jury selection. Thus, petitioner cannot claim that he preferred to have the district court conduct jury selection, but failed to object to the magistrate's supervision of jury selection because he regarded such an objection as futile. This Court recently has denied review in several cases that raised the same issue that petitioner seeks to raise here. See *Popal* v. *United States*, cert. denied, 110 S. Ct. 1111 (1990); *Mang Sun Wong* v. *United States*, cert. denied, 110 S. Ct. 1140 (1990); *Billini* v. *United States*, cert. denied, 110 S. Ct. 2186 (1990). In each of those cases, the defendant consented to a magistrate's supervision of jury selection, and this Court denied review of the defendant's claim that the affirmative consent did not result in a waiver of the *Gomez* claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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Assistant Attorney General

J. DOUGLAS WILSON
Attorney

NOVEMBER 1990

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FILED
MAR 7 1991
OFFICE OF THE CLERK

(3)

No. 90-615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 10, 1990
CERTIORARI GRANTED JANUARY 22, 1991

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The following opinion and order have been omitted in printing in the joint appendix. They appear in the appendix to the printed petition for certiorari:	
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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
District Court Proceedings	
(Docket No. 88 Cr. 434 (CPS))	
7/13/88	Magistrate complaint filed and defendants arraigned.
7/25/88	Indictment filed.
8/8/88	Defendants Peretz and Slavska-Szulejkl arraigned on indictment.
10/14/88	Status conference before District Judge Sifton. Jury selection scheduled before a magistrate.
1/6/89	Jury selection held before Magistrate Amon.
1/11/89	Jury sworn and trial begins before District Judge Sifton.
1/20/89	Trial ends with jury verdict of guilty as to defendant Peretz and not guilty as to defendant Slavska-Szulejkl.
9/28/89	Defendant Peretz sentenced by District Court.
10/5/89	Notice of Appeal filed.
10/18/89	Judgment of conviction and sentence docketed.
Court of Appeals Proceedings	
(Docket No. 89-1543)	
3/27/90	Oral argument.
4/23/90	Convictions affirmed.
7/11/90	Petition for rehearing denied.

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR 88 434

UNITED STATES OF AMERICA,

-against-

RAFAEL PERETZ and MARGARET STLAVSKA-SZULEJKO,
Defendant.

United States Courthouse
Brooklyn, New York

October 14, 1988

TRANSCRIPT OF STATUS
BEFORE THE HONORABLE CHARLES P. SIFTON
UNITED STATES DISTRICT JUDGE

* * * *

[6] THE COURT: During the week of the 24th. We'll pick a jury—

MR. BREITBART: You said the 22nd.

THE COURT: The 24th.

Is that—

MR. BREITBART: It's okay with me.

MR. LOPEZ: October 24 and 25 is going to be difficult for me but Thursday and Friday is okay with me.

THE COURT: Let's try to pick a jury Thursday morning. Any objection to picking the jury before a magistrate?

MR. BREITBART: I would love the opportunity.

THE COURT: Thank you very much.

MR. BREITBART: That is for jury selection and trial either immediately or next week on Thursday and Friday.

MR. BREITBART: Has Mr. Belkin consummated.

THE COURT: We've been proceeding without a government lawyer.

MR. BREITBART: I thought you knew.

THE COURT: If we can't go we will to over and try to finish it up the next week.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Caption Omitted in Printing]

December 2, 1988

[January 6, 1989]

**TRANSCRIPT OF JURY SELECTION,
BEFORE THE HONORABLE CAROL B. AMON,
UNITED STATES DISTRICT MAGISTRATE**

* * * *

[2] THE CLERK: Criminal cause for jury selection, The United States of America v. Rafael Peretz.

MR. BELKIN: Ira Belkin, for the Government.

MR. BREITBART: David Breitbart for the defendant Rafael Peretz.

MR. LOPEZ: Frank Lopez, for the defendant Margaret Slavska Szulejko.

THE COURT: Please be seated.

Are you ladies and gentlemen ready for jury selection?

MR. BELKIN: Yes, your Honor.

THE COURT: Now, I have the first named defendant Rafael Peretz; is that correct, the correct pronounciation, Mr. Breitbart?

MR. BREITBART: Yes, your Honor.

THE COURT: And Mr. Lopez, you are going to have to help me with the name of your client.

MR. LOPEZ: Margaret Szulejko.

THE COURT: You are prepared to proceed, Mr. Breitbart?

MR. BREITBART: Yes, your Honor.

THE COURT: Mr. Breitbart, I have the consent of your client to proceed with the jury selection?

MR. BREITBART: Yes, your Honor.

THE COURT: And Mr. Lopez, do I have the consent [3] of your client to proceed?

MR. LOPEZ: Yes, your Honor.

MR. BREITBART: We would ask until we have an opportunity to speak to Judge Sifton but we may be trying this case on Thursday and Friday and I think it is a fairly important consideration, discussing it with the jury.

THE COURT: Let me explain what my understanding is and then we'll discuss it. I have been told by Judge Sifton it will be a few days a week on Thursday and Friday. That's all day Thursday and Friday. It was to begin on January 12, at 9:30.

Now, you say that there is a possibility it will begin when?

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Caption Omitted in Printing]

January 11, 1989

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHARLES P. SIFTON
UNITED STATES DISTRICT JUDGE

* * * *

[2] THE CLERK: Criminal cause on trial, United States versus Rafael Peretz and Margaret Slavska-Szulejko.

THE COURT: Would you swear the interpreters.

(RUTH KOHN, sworn to interpret Polish into English)

(EMANUEL SMIKUN, sworn to interpret Hebrew into English)

THE COURT: What happened here, Mr. Breitbart? 16 jurors and a lot of lawyers have been waiting for you for over a half an hour.

MR. BREITBART: There is no [ex]cuse, judge, it was just a misinterpretation. I was under the impression it was a 10:00 o'clock call.

THE COURT: Nobody else seems to have made that mistake. I think you better attend a little more carefully the next time because it has pretty severe consequences for a lot of people on the first day of trial to have all the jurors get here on time and then just sit waiting.

MR. BREITBART: It won't happen again, judge.

(Brief pause.)

THE COURT: While we're waiting for the defendants, what are the outstanding matters? I'm aware of the motion to surpress statements that you've made. The government has made an in limin[e] motion with regard to the statements made by Miss Slavska-Szulejko, if I'm pronouncing her name correctly, and there is also a severance application which I assume has been resolved because of the government's proposed redaction [3] of statements. Is there anything else?

MR. BREITBART: There is the question, depending upon the decision on the motion to surpress the statement, there is the Bruton issue as to what can in fact be offered because both of the defendants are going to trial at the same time. There are statements—

THE COURT: I thought that that had been resolved by a proposed redaction of Mr. Peretz's statement. If I'm wrong about that, you can tell me.

MR. BREITBART: The government had proposed—

THE COURT: Now that the defendants are here, the interpreters have been previously sworn, Mr. Peretz, do you want to tell us if you are able to follow the interpreter.

We're late in getting going because one of the participants was delayed in getting here. We're ready to start now. The jury is here ready to try the case. There are, as we were just discussing while waiting for you to come up, a number of pending applications which require resolution and I was just going over them to make sure I was aware of everything that is still unresolved. The first question is the admissibility of statements alleged to have been made by Mr. Peretz at the time of and subsequent to his arrest. The second matter was an in limin[e] application, that is a pretrial application for a ruling on the use of Miss Slavska-Szulejko's post-arrest statements; and finally, there [4] is an application for a severance of the trial of the two defendants which I just

said I thought had been resolved by the government's proposal to redact a portion of Mr. Peretz's statement to omit any reference to his co-defendant.

Is there anything else that anyone thinks is pending or any difference as to what is pending?

Mr. Breitbart, is there anything else that you think is pending?

MR. BREITBART: No, judge except that there was never any agreement, we were waiting for a ruling on the Bruton thing. I know there had been a proposal but there was never a determination.

THE COURT: Sorry, I thought that since there was no response, that that was agreeable to both sides.

All right, with regard to the post-arrest statements of Mr. Peretz, I've heard the evidence at the pretrial hearing and considered the arguments that you've made. It seems to me that the statements are voluntary and made with full understanding of the constitutional protections and after a waiver of those protections by Mr. Peretz.

So I'm going to deny the application to su[p]press the statements that were made. The first of those statements appears to me to have been a volunteered statement that was voluntarily and not coerced and prior to the time when a warning was required from the arresting agents. [5] The other statements, the lengthy narrative statements given by Mr. Peretz explaining his presence and his involvement in the situation which led to his arrest appear to me to evidence an intelligent understanding of the situation after a warning.

Mr. Peretz appears to me sufficiently well acquainted with the English language and sufficiently mature to have appreciated what was being said to him and to have decided on the best course of action which was to seek to persuade arresting agents that he should be released, and under the circumstances, it doesn't seem to me that the decision of the government to use those statements against him in a criminal prosecution should relieve him of the waiver, a knowing and intelligent waiver of his constitutional rights.

With regard to the in limin[e] application of the government to rule that Miss Slavska-Szulejko's post-arrest statements not be brought out by the defendants on cross-examination or on the defense case, since I can't articipate every circumstance in which questions along the line, on that subject might come up, I don't find it possible to rule definitively that under no circumstances may those statements be inquired into, however, as a general matter, the offer of those statements to prove the truth of what Miss Slavska-Szulejko was saying, a use of them, that in general is prohibited under the hearsay rules unless something about the [6] circumstances under which they are uttered or the subject that they cover bring it within one of the exceptions to the hearsay rule.

So before any inquiry is made into the contents of those statements, I'll ask that counsel, that the defendants alert me to the fact that they intend to make the inquiry and I'll rule on the matter at the time the inquiry is made.

With regard to the application by Miss Slavska-Szulejko for a severance from Mr. Peretz, is the redaction of Mr. Peretz's statement that is proposed by the government adequate as a method of curing the situation calling for a severance?

MR. BREITBART: I'm having trouble finding that document offered by the government.

THE COURT: It's a letter of October 20th. If you'd like the original, I have it here.

In any event, it's the situation in which Miss Slavska-Szulejko is interested in, not Mr. Peretz.

Mr. Lopez, any problem with the redaction that is proposed?

MR. LOPEZ: No, there is no problem with that, your Honor.

THE COURT: All right, then can we proceed with this jury which has been waiting for some period of time.

Swear them in and get started.

(Jury in at 10:25)

SUPREME COURT OF THE UNITED STATES

No. 90-615

RAFAEL PERETZ,

Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to the following questions: 1. Does 28 U.S.C., Section 636, permit a magistrate to conduct the voir dire in a felony trial if the defendant consents? 2. If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial voir dire provided that the defendant consents, is the statute consistent with Article III? 3. If the magistrate's supervision of the voir dire in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

January 22, 1991

SUPREME COURT OF THE UNITED STATES

No. 90-615

RAFAEL PERETZ,

Petitioner

v.

UNITED STATES

ON CONSIDERATION of the motion of petitioner for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

February 25, 1991

Supreme Court, U.S.
FILED
MAR 6 1991
OFFICE OF THE CLERK

No. 90-615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does 28 U.S.C. Section 636 permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?

2. If 28 U.S.C. Section 636 permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?

3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-615

RAFAEL PERETZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The decision of the court of appeals is reported at 904 F.2d 34 (2d Cir. 1990) (Table), but the court's opinion is unpublished. The opinion is reproduced at Pet. A. 1a-4a.[1] The district court issued no written opinion in this case.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990 (Pet. A. 5a-6a). Certiorari was granted on January 22, 1991, limited to three questions. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

[1] J.A. refers to the Joint Appendix filed in this Court. Pet. A. refers to the appendix annexed to the petition for certiorari. Brf. A. refers to the appendix, containing constitutional and statutory materials, annexed to this brief.

STATEMENT

Petitioner Rafael Peretz and a co-defendant were charged in a three-count indictment filed July 25, 1988, in the United States District Court, Eastern District of New York (J.A. 1). Specifically, Peretz and the co-defendant were charged with importing approximately four kilograms of heroin, which were seized in the possession of the co-defendant on July 12, 1988, during an incoming Customs search at John F. Kennedy International Airport in New York City.

In an informal status conference held October 14, 1988, before the Hon. Charles P. Sifton, district judge, at which no government attorney was present, the court asked Peretz's counsel whether there was "[a]ny objection to picking the jury before a magistrate?" Counsel replied, "I would love the opportunity" (J.A. 2). Immediately before commencing jury selection on January 6, 1989,[2] the magistrate, Carol B. Amon, asked Peretz's counsel for consent, and counsel complied (J.A. 5). Magistrate Amon then proceeded to conduct the *voir dire*, a process that produced 90 pages of transcript. At one point, the magistrate granted a government cause challenge and excused a juror over defense counsel's vigorous objection. Tr. 26.

There is no evidence in the record that anyone explained to Peretz the difference between an Art. III district judge and a magistrate, or that he had a right to have an Art. III judge preside at jury selection at all. In fact, prior to petitioner's trial, the second circuit held that a defendant had no statutory or constitutional right to the presence of the district judge at felony *voir dire*, *see United States v. Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez v. United States*, 109 S. Ct. 2237 (1989), and it was the "practice . . . in this circuit" to override a defendant's objection to assignment of this function to a magistrate, *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990). No one explained to Peretz (or to his counsel) that Peretz had a right to obtain review by the district judge of the magistrate's handling of jury selection, nor did any local rule set forth a procedure for such review. Peretz did not personally consent to substitution of a magistrate at *voir dire*.

[2] The transcript is dated December 2, 1988, but the docket sheet reflects that the *voir dire* occurred January 6, 1989. Only the pre-*voir dire* colloquy was transcribed for the proceedings below and is part of the record on appeal; the balance of the jury selection transcript was prepared after certiorari was granted. The complete transcript has been lodged with the Clerk's Office of this Court.

On January 11, 1989, the jury was sworn before the district court judge. The court did not offer or in fact conduct any review of the jury selection process (J.A. 6-9). Nine days later, Peretz was convicted on all three counts; his co-defendant was acquitted. Prior to sentencing, Peretz moved to set aside the verdict in light of this Court's decision in *Gomez v. United States*, that magistrates lack authority to conduct jury selection for a felony trial. The court denied the motion. Sentencing Tr. 4 (Sept. 28, 1989). It then sentenced petitioner to concurrent sentences on each count of 135 months in prison and five years of supervised release, and a total special assessment of $150.

On appeal, Peretz argued that reversal was required because (1) the district court had failed to obtain his knowing, voluntary, written personal waiver of his fundamental right to have an Art. III judge preside at jury selection; (2) the error was jurisdictional and could be raised on appeal despite the absence of a contemporaneous objection; and (3) such objection would have been futile.[3] Brf. for Appellant 10-19.

In an unpublished, summary affirmance of petitioner's conviction, the court of appeals held that petitioner's arguments were foreclosed by *United States v. Mang Sun*

[3] Petitioner also challenged the legality of his arrest at the airport and the sufficiency of the evidence to convict him at trial, issues that he does not press in this Court.

Wong, 884 F.2d 1537, 1546 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990) (defendant's personal, verbal consent waived any appellate challenge), and *United States v. Musacchia*, 900 F.2d 493, 501-03 (2d Cir. 1990) (rejecting futility argument). Pet. A. 1a-4a. The panel failed to address Peretz's adequacy-of-waiver and jurisdictional arguments. Subsequently, Peretz's petition for rehearing *en banc* was denied. Pet. A. 5a-6a.

Peretz's petition for certiorari suggested that the matter be held pending the Court's resolution of similar issues raised in *United States v. France*, 886 F.2d 223 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 1921 (1990), which was argued in October, 1990. When the Court divided 4-4 in *France* on January 22, 1991, it simultaneously granted certiorari in this case to again try to resolve post-*Gomez* issues that have badly fractured the circuit courts.[4] Petitioner's motion to proceed *in forma pauperis* also was granted.

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[4] The first and ninth circuits have held that *Gomez* stated a jurisdictional rule that applies regardless of whether the defendant lodged a contemporaneous objection, and that, in any event, there is no waiver of appellate rights where objection would be futile. *United States v. Martinez-Torres*, 912 F.2d 1552 (1st Cir. 1990) (en banc); *United States v. France*, 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided court* (Jan. 22, 1991). Both courts also have held that reversal is required where the defendant's "consent" was not knowing, intelligent, voluntary, and explicit. *United States v. Aikins*, 912 F.2d 285 (9th Cir. 1990), *modified*, 923 F.2d 650 (9th Cir. 1991); *Martinez-Torres*, 912 F.2d at 1556 (also requiring consent to be written).

The third circuit, while agreeing that *Gomez* stated a jurisdictional rule, disagreed that a magistrate lacks jurisdiction to preside when the defendant consents. *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (3d Cir.), *cert. denied*, 110 S. Ct. 2211 (1990). The seventh circuit has assumed that delegation to a magistrate is error, but has suggested that the error does not warrant reversal under the plain error rule and is not jurisdictional. *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990). However, in *United States v. Lake*, 910 F.2d 414, 417 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990), the same court implied a constitutional requirement of an explicit, knowing waiver.

The second circuit initially took the position that the procedure was error under *Gomez* but was not "plain error," *see United States v. Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989) (explicit verbal consent), *cert. denied*, 110 S. Ct. 1140 (1990); *United States v. VanWort*, 887 F.2d 375, 382-83 (2d Cir. 1989) (failure to object equated with explicit consent), *cert. denied sub nom. Chapoteau v. United States*, 110 S. Ct. 1927 (1990), but has since held that jury selection with the defendant's consent is proper and that, to preserve an objection, the defendant must make a formal, written pretrial motion under Fed. R. Crim. P. 12(b)(1). *See United States v. Musacchia*, 900 F.2d 493, 502-03 (2d Cir. 1990); *United States v. Alvarado*, 923 F.2d 253, 1991 U.S. App. Lexis 638 (2d Cir. 1991) (on remand) ("approved" practice). Yet, the same court, equating the right to trial before a district judge with the right to trial by jury, later granted the *government's* writ of mandamus to prevent a district judge, post-*Gomez*, from delegating jury selection to a magistrate with the defendant's consent. *In re United States (Sayeedi)*, 903 F.2d 88 (2d Cir. 1990).

SUMMARY OF THE ARGUMENT

I. In *Gomez v. United States*, 109 S. Ct. 2237 (1989), this Court unanimously held that federal magistrates are not empowered to preside at the *voir dire* for a felony trial, and that, where the defendant has objected, he is entitled to have his conviction reversed. The Court's painstaking review of the history and the structure of the Federal Magistrates Act, 28 U.S.C. §§ 631-636, found no evidence that Congress ever intended magistrates to perform such a critical, essentially unreviewable adjudicatory function, but found overwhelming evidence to the contrary. Following *Gomez*, the Solicitor General repeatedly has conceded before this Court, and the government conceded in the court below, that such a delegation is error, even where the defendant consents.

While two circuits have disagreed with this conclusion, one without any reasoning and the second in reliance upon the Act's "additional duties" clause, § 636(b)(3), their position is untenable. Section 636(b)(3) authorizes "[a] magistrate to be assigned such additional duties as are not inconsistent with the Constitution and laws of the

United States." However, as noted above, *Gomez* narrowly construed this language so as not to negate the balance of the statute, which carefully delineated magistrates' duties, including the scope of their consent trial jurisdiction. Additionally, even with the defendant's "consent," magistrate-conducted felony *voir dire* is "inconsistent" with the Federal Rules of Criminal Procedure, which have the effect of law, and which authorize only a district judge to preside at jury selection and at all other phases of a felony trial. Finally, magistrate-conducted felony *voir dire* presents divisive constitutional issues of a nature—separation of powers—that this Court always seeks to avoid reaching unnecessarily. Thus, the Court should construe the statute to preclude magistrates from performing this function regardless of whether the defendant "consents."

II. Art. III requires that the "judicial power" of the United States be exercised by judges whose independence is assured because they have life tenure and an irreducible salary. An individual litigant can complain on appeal that he has been unfairly deprived of his personal right to Art. III adjudication, or that a structural violation of Art. III has occurred which no individual litigant is competent to protect, and which therefore can never be "waived" by a party. In this case, petitioner asserts violation of both individual and structural concerns.

Regarding the structural question, the Court has recognized two general exceptions to the basic Art. III requirement that the "judicial power" be personally exercised by Art. III judges: Congress' constitutional authority to permit non-Art. III "legislative" courts to adjudicate disputes connected to regulatory schemes, and its authority to permit preliminary adjudicatory functions to be performed by Art. III "adjuncts," subject to independent review by the Art. III district court. Because the "legislative" court exception directly clashes with structural values underlying Art. III, the Court has had to weigh the competing constitutional interests by means of a balancing test. *See Commodity Futures*

Trading Commission v. Schor, 478 U.S. 833 (1986). The *Schor* analysis does not apply here because the Magistrates Act does not create "legislative" courts but "inferior" or "adjunct" officers within the judicial branch.

In evaluating the constitutionality of an adjunct scheme, the Court relies upon the degree to which independent decisionmaking is reserved to the district court in relation to the importance of the adjudicatory function under Art. III. It has never upheld delegation of felony trial functions, but only preliminary evaluations of Social Security matters, *Mathews v. Weber*, 423 U.S. 261 (1976), and recommended dispositions of pretrial suppression motions subject to independent district court review, including *de novo* review where requested, *United States v. Raddatz*, 447 U.S. 667 (1980). In evaluating Art. III interests, *Raddatz* pointedly distinguished between a pretrial suppression hearing and the ultimate truth-seeking function at a criminal trial. *Id.* at 679.

Art. III interests certainly are at their zenith at a felony trial, of which jury selection is a "critical" first stage. *Gomez*, 109 S. Ct. at 2246-48. The *voir dire* process is integrally related to the trial's truth-seeking function, since it determines the factfinders who will in turn decide the ultimate question of the defendant's guilt or innocence. Because the judge's role at *voir dire* is inherently subjective and discretionary, *Gomez* seriously doubted that a district judge could ever conduct a meaningful independent review. 109 S. Ct. at 2247. Moreover, even if such a review could be conducted from a cold transcript—assuming, unlike in this case, that a transcript was prepared—the district judge could not requestion jurors, especially jurors who already had been excused and assigned to new trials, or otherwise correct prejudicial conduct by the participants without causing further prejudice or demeaning the entire process. *Id.* at 2247 & n.29. Because independent review of felony *voir dire* is impossible, the presiding magistrate acts impermissibly as a substitute judge rather than as a judge-assistant, in violation of Art. III.

Even if this Court applies the *Schor* balancing test, which heretofore has been applied only to test the constitutionality of "legislative" courts, allowing magistrates to preside at felony *voir dire* is inconsistent with Art. III. Congress' failure to specifically authorize magistrates to exercise this function shows that it had no interest in such a scheme. Congress' sole overall interest underlying the Magistrates Act—curtailing the Judiciary's budget by diverting work to less costly personnel—already is being accomplished by magistrates in other ways; there is no pressing need also to involve magistrates, in place of judges, at critical stages of a felony trial. On the other hand, the Art. III interests are substantial. At every stage of the prosecutorial process, from bail decisions through trial and sentencing, society has a vital interest in the independent application of federal criminal laws which individual parties, especially a criminal defendant, cannot be expected to protect. Magistrates, when called upon to make *de facto* final judgments at felony *voir dire*, are independent neither of the Legislative Branch, which ultimately controls their tenure, salary, and range of duties, nor of the judiciary. The risk-averse adjudication that magistrates' inherent insecurity will produce is counter to the Framers' notion of an independent federal judiciary "servant only to their conscience."

III. If the delegation of *voir dire* in this case did not satisfy statutory or constitutional prerequisites, then petitioner did not have to object to preserve his appellate rights. This is true, under the facts of this case, regardless of whether the Art. III rights involved are "waivable."

As an initial matter, if Congress has withheld authority from magistrates to preside at felony *voir dire* without regard to "consent" or "waiver," then a magistrate who nevertheless presides violates Art. III, since Congress alone can empower a court to exercise Art. III jurisdiction. It is basic that a party always can raise a defect going to the power or jurisdiction of the tribunal, at least on direct appeal, regardless of whether he objected below. The Court need not decide whether the entire trial was defective; it is enough to find that an incompetent tribunal presided throughout a "critical" stage of a felony trial. The same principle would apply if the Court found a structural Art. III violation.

On the other hand, as *Schor* and *Gomez* suggest, even if petitioner's personal Art. III rights were waivable, the Court's conclusion in *Gomez* that jury selection is a "critical" stage of trial, at which a defendant has a "basic" right to the presence of a competent tribunal, requires application of a rigorous waiver standard. Where the Court has required that a waiver of a "basic" or "fundamental" trial right be knowing, intelligent, or voluntary, it has placed the burden on the government to establish such a waiver. In such instance, the defendant is not required to make an affirmative objection to "preserve" his appellate rights.

The Magistrates Act itself incorporates the *Johnson v. Zerbst*, 304 U.S. 458 (1938), constitutional waiver standard for fundamental trial-related structural rights, both in the text of 18 U.S.C. § 3401 and in the legislative history. Moreover, the *Gomez* Court's analysis of the integral relationship between an impartial jury selection process and the truthseeking function of a criminal trial provides an independent constitutional basis for applying the same strict waiver standard. Held to this standard, the casual process followed in this case, in which counsel alone signalled "consent," with no on-the-record explanation to petitioner of the "right" being relinquished, did not waive petitioner's rights. Indeed, no relinquishment of a "known right or privilege" could have occurred when, at the time of petitioner's trial, the second circuit had announced to the world that there was no such right. Nor could the defendant's "consent" be deemed voluntary in light of the district court's inherently coercive request and the practice in the circuit, which *Gomez* illustrates, to delegate felony *voir dire* to magistrates even where the defendant objected. Thus, petitioner's right to the presence of a competent tribunal at felony *voir dire* was violated, and his conviction must be reversed.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A MAGISTRATE TO PRESIDE AT JURY SELECTION FOR A FELONY TRIAL REGARDLESS OF WHETHER THE DEFENDANT 'CONSENTS'

Based upon a comprehensive analysis of the history and structure of the Federal Magistrates Act, 28 U.S.C. §§ 631-636, this Court unanimously concluded two years ago that Congress had not intended to empower federal magistrates to preside at the critical jury selection-phase of a felony trial. *Gomez v. United States*, 109 S. Ct. at 2245-46. While the defendants in *Gomez* had objected to this procedure, this fact was irrelevant to the Court's determination. *Gomez* thus controls irrespective of any purported "consent."

The Magistrates Act carefully delineates the specific functions that magistrates may exercise both in the pretrial, § 636(b)(1), and the trial, § 636(a)(3) and (c), context, and sets forth explicit procedures and standards for district court review. *See generally Gomez v. United States*, 109 S. Ct. at 2242-46; Brf. A. 3-5. While the statute also permits the district court to assign magistrates "additional duties not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636 (b)(3), the Court in *Gomez* declined to give this language the literal construction urged by the government. "When a statute creates an office to which it assigns specific duties," the Court observed, "those duties outline the attributes of the office." 109 S. Ct. at 2241. Thus, the Court reasoned, Congress' "carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.* at 2245. Since Congress almost certainly viewed jury selection as part of a felony trial, it must have intended to withhold authority for magistrates to provide over this critical function. *Id.* at 2246. But even if Congress had viewed jury selection as a pretrial matter, having prescribed review procedures for all other substantive pretrial functions, it would not have permitted magistrates to preside without any provision for *de novo* district court review. *Id* at 2246-47. Finally, the Court concluded:

> The absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function.

Id. at 2247 (footnote omitted).

The Solicitor General readily conceded in his written and oral presentations in *United States v. France* that jury selection by a magistrate in a felony case is error even when the defendant does not object.[5] The government made a similar concession in petitioner's case in the court of appeals. Gov't. Brf. 13 ("*Gomez* simply held that the Federal Magistrates Act does not permit district courts to delegate the jury selection function to a magistrate"). Nevertheless, the second circuit has "approved" this practice without identifying any source of authority under the Magistrates Act. *United States v. Musacchia*, 900 F.2d 493, 502-03 (2d Cir. 1990); *see supra* at 4, n.4. The third circuit, too, has approved the practice, relying upon the "additional duties" clause, § 636(b)(3). It has reasoned that *Gomez*'s statutory analysis was entirely premised upon this Court's desire to avoid constitutional issues which, in the third circuit's view, would be absent in a consent context. *Government of Virgin Islands v. Williams*, 892 F.2d 305, 308, 310 n.2 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990). We believe the third circuit has misread *Gomez*.

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[5] *See, e.g.*, Brief for United States 7 ("[t]he delegation, even though error . . ."); *id.* at 21 ("we now know that magistrates are not authorized to conduct felony jury selection"); Reply Brf. 11 ("*Gomez* held that the Magistrate's Act does not authorize a magistrate to preside over jury selection"); Tr. of Oral Argument at 6 (". . . it is accepted, of course that Congress didn't authorize this procedure to be followed . . . and it is a right, we submit, to have a judge conduct jury selection").

While *Gomez* did note that a statute should be construed where possible to avoid constitutional issues, 109 S. Ct. at 2241, the Court "readily" (*id.*) concluded that Congress did not intend to authorize magistrates *ever* to preside at felony *voir dire* because that thesis was overwhelmingly supported by the statute's structure and history. Indeed, the Court's analysis did not identify a single circumstances suggesting a contrary legislative intent. Thus, the Court did not limit its "conclu[sion] that Congress . . . did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties," *id.* at 2245-46, to situations in which the defendant makes a timely objection.

Moreover, consent jurisdiction for felony *voir dire* would raise substantial constitutional issues involving separation of powers, which the Court has been especially concerned to avoid. *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2258, 2272 (1989). The Court's "serious doubts that a district judge could review *voir dire* meaningfully." *see Gomez*, 109 S. Ct. at 2247, together with Art. III's textual requirement that the federal judicial power be exercised by Art. III judges, demonstrates the seriousness of the Art. III issue. *See* Point II, *infra*. The use of magistrates as "principal" rather than "inferior" officers to make essentially unreviewable final determinations in the selection of felony juries arguably would also violate the Appointments Clause, Art. II, § 2, cl. 2. *See infra* at 29 n.12. Moreover, the casual waiver by petitioner's counsel did not come close to satisfying the *Johnson v. Zerbst*, 304 U.S. 458 (1938), waiver standard for critical trial-related rights, which Congress expressly adopted, and which the Constitution surely requires, for waiver of a criminal defendant's basic right to the presence of an Art. III judge at trial. *See Gomez*, 109 S. Ct. at 2248; *infra* at Point III(B).

Finally, the "additional duties" clause does not empower magistrates to preside at jury selection because such a construction indeed would be "inconsistent with

. . . the laws of the United States," specifically, the Federal Rules of Criminal Procedure, which are "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2374 (1988). *See also United States v. Hvass*, 355 U.S. 570, 575 (1958) ("[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes [the federal rules]"). The rules authorize only a district court judge, to the exclusion of magistrates, to preside at a felony trial, or at the very least they are "inconsistent" with the notion of a magistrate presiding at the jury selection phase of such a trial.

Rules 23-31, relating to "Trial," authorize a 'court" or a "judge" to perform trial-related functions—one of which is empanelment of the jury under Rule 24 (reproduced at Brf. A. 6)—but do not refer to magistrates. This is a significant omission, in that Rule 1 ("Scope") (Brf. A. 6) provides that the rules apply to magistrates only when "specifically provided in one of the rules." *See, e.g.*, Fed. R. Crim. P. 3, 4, 5, 5.1, 9, 32.1, 40, 41. *See also* Fed. R. Crim. P. 54(c) (separately defining "court", "judge" and "magistrate"); 28 U.S.C. § 132(b) (not including magistrate within definition of "district court"). Congress could have chosen to include magistrates within the definition of "court" or "judge" in order to authorize magistrates to substitute for district judges generally, or even specifically with respect to jury selection under Rule 24, but evidently chose not to do so. *Compare* Fed. R. Evid. 1101(a) ("[t]he terms 'judge' and 'court' in these rules include . . . United States magistrates").

Similarly, Rule 25(a) (Brf. A. 6) is inconsistent on two grounds with delegation of felony *voir dire* to a magistrate for the mere convenience of the district court, which is the procedure's sole rationale. First, Rule 25(a) permits one "judge" to substitute for another during the trial only "by reason of death, sickness or other disability," and then only where the successor judge certi-

fies familiarity with the record. Thus, a magistrate cannot conduct jury selection merely for the district judge's convenience without any provision for the judge, before substituting for the magistrate for the balance of the trial, to "certify[] familiarity with the record." Second, the assumption underlying Rule 25(a), which refers only to a "judge" presiding at trial, is that a "judge" is the officer who commences a trial and is replaceable only by another "judge." This terminology is plainly inconsistent with the notion of a magistrate commencing the trial by conducting the *voir dire*. " 'Judge of the United States' . . . is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." 1972 Advisory Committee Notes, 18 U.S.C.A. Rule 54 (West 1976) at 626-27. Only if jury selection is understood to be a *pretrial* function can Rule 25(a) be reconciled with the use of a magistrate, but the unanimous Court in *Gomez* stated that Congress almost surely believed that *voir dire* was part of the trial itself. 109 S.Ct. at 2246.

The Court's holding in *Wingo v. Wedding*, 418 U.S. 461 (1974), directly supports this point. In that case, the Court invalidated the assignment of a habeas corpus hearing to a magistrate under an identically-worded "additional duties" clause because such an assignment was inconsistent with the Habeas Corpus Act, which required such hearings to be conducted by "[t]he court, or justice, or judge." *Id.* at 466-67 (citing Rev. Stat. § 761, 28 U.S.C. § 461 (1940 ed.)). While the 1976 amendments to the Magistrates Act were intended to "overrule" *Wingo v. Wedding* by explicitly authorizing magistrates to conduct habeas corpus hearings—and all *pretrial* proceedings under § 636(b)(1)—"[n]otwithstanding any provision of law to the contrary," *see Gomez*, 109 S. Ct. at 2243 n.14; H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6169, this clause did not also modify the "additional duties" authorized by § 636(b)(3). Thus, *Wingo v. Wedding*'s reasoning remains valid with respect to any function assigned pursuant to the "additional duties" clause.

Finally, even if the Court concluded that Congress intended to authorize magistrates to exercise consent jurisdiction over felony *voir dire*, such "consent," as a matter of statutory as well as constitutional interpretation, must be obtained personally from the defendant, in writing, under the "knowing, intelligent, and voluntary" waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), which Congress expressly adopted. *See* Point III(B), *infra*. Petitioner's counsel's "consent" did not meet this standard, *see* Point III(C), *infra*, which is a statutory prerequisite to a magistrate's exercise of trial jurisdiction. *See Gomez*, 109 S. Ct. at 2245 ("magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"). *See infra* at 39-40 & n.22.

II. A CRIMINAL DEFENDANT MAY NOT CONSENT TO A MAGISTRATE'S EXERCISE OF ARTICLE III 'JUDICIAL POWER' AT A FELONY TRIAL

Despite Art. III's textual requirement that officers exercising the "judicial Power of the United States" enjoy lifetime tenure and an irreducible salary, a federal magistrate without these guarantees of independence selected the jury in petitioner's case, with no statutory provision for, and no *de facto* means of, *any* review by an Art. III judge. For this reason, the broad constitutional issue the Court has framed—whether Art. III permits magistrates to exercise consent jurisdiction over felony *voir dire*—requires a negative answer.[6]

"The inexorable command of [Art. III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (plural-

[6] The relevant provisions of Art. III are reproduced at Brf. A. 1a.

ity opinion). There are two broad exceptions to this general requirement that adjudicatory powers be exercised only by Art. III judges. The first concerns the delegation of jurisdiction to "legislative" or non-Art. III courts, and the second involves the delegation of adjudicatory functions to court "adjuncts." *See* Note, *The Boundaries of Article III: Delegation of Final Decision-making Authority to Magistrates*, 52 U. Chi. L. Rev. 1032, 1038-45 (1985) (hereinafter "Chicago Note").

A magistrate assigned to conduct felony *voir dire* acts as a court adjunct. *See infra* at Point II(A). To be constitutional, court adjuncts must be subject to meaningful review by an Art. III judge. *See infra* at Point II(B). However, even if this Court determines that magistrates fall under the "legislative" tribunal exception to Art. III, or chooses to extend to magistrates the balancing test for "legislative" courts it used in *CFTC v. Schor*, the power to conduct felony *voir dire* is constitutional only if the Art. III interests implicated are outweighed by Congress' interest in permitting adjudication by a non-Art. III official. *See infra* at Point II(C).

A. Magistrates Purport to Act as Article III-'Adjuncts' When Conducting Felony *Voir Dire*

It has long been recognized that Art. III judges need not perform all adjudicatory functions. Congress may establish non-Art. III tribunals to adjudicate disputes arising out of Congress' attempt to carry out specific grants of Constitutional authority to regulate conduct in the territories or the military, to enforce "public" as opposed to purely "private" rights, or to implement specialized regulatory schemes. *See generally* Chicago Note at 1038-42. However, Congress' "power to place adjudicative authority in non-Article III tribunals is circumscribed." *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2796 (1989). Claims adjudicated in such tribunals must be "closely intertwined with a federal

regulatory program Congress has power to enact." *Id.* at 2797. Congress may not "create courts free of Art. III's requirements whenever it finds that course expedient." *Northern Pipeline*, 458 U.S. at 73.

The limitation upon Congress' power to create non-Art. III tribunals is especially strict in the criminal context. It has long been assumed that, with the exception of the aforementioned territorial and military courts established under Congress' specific Art. I or Art. IV powers, Congress may not empower a non-Art. III tribunal to preside at a felony trial. Thus, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the Court held that Congress could not empower military tribunals to exercise criminal jurisdiction over ex-servicemen even for crimes committed while the defendant was on active duty. *See O'Callahan v. Parker*, 395 U.S. 258 (1969) (non-service-connected crimes by soldier must be tried in civilian court); *Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependents of members of the armed forces stationed overseas cannot be tried in a military court). In *Palmore v. United States*, 411 U.S. 389 (1973), the Court upheld the exercise of criminal jurisdiction by Art. I courts created to adjudicate local prosecutions in the District of Columbia, but suggested that Congress could not create Art. I criminal jurisdiction where "laws of national applicability and affairs of national concern are at stake." *Id.* at 408. *See Northern Pipeline*, 458 U.S. at 76. The Court has declared that "the public-rights doctrine does not extend to any criminal matters." *Id.* at 70 n.24. Referring to private civil adjudications of traditional common law claims, "and all criminal matters, with the narrow exception of military crimes," the Court has stated: "There is no doubt that when the Framers assigned the 'judicial Power' to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power." *Id.* at 70 n.25. Thus, the power to adjudicate a case such as petitioner's involving application of a federal criminal stat-

ute of national applicability cannot be conferred upon an alternative, non-Art. III tribunal.

However, the office of magistrate does not function as an Art. I or "legislative" court. Rather, Congress expressly created the magistrate as "an adjunct of the United States District Court." H.R. Rep. No. 287, 96th Cong., 1st Sess. 8 (1979). Magistrates are subject to appointment and removal by the judiciary, 28 U.S.C. § 631(a) and (i), and are classified as employees of the judicial branch. 28 U.S.C. § 634(c). This Court has treated magistrates under the "adjunct" model. *See Northern Pipeline*, 458 U.S. at 79; *Raddatz*, 447 U.S. at 681-82. Nevertheless, a realistic assessment of the magistrate's role, not its characterization by Congress, must control Art. III analysis. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Because a magistrate's conduct of the critical jury selection stage of a felony trial is not susceptible to independent district court review, the magistrate exercises *de facto* judicial power, functioning as a judicial clone rather than "adjunct"-assistant, in violation of Art. III.

B. Because a Magistrate's Conduct of Felony *Voir Dire* is Immune From Meaningful Independent Review by the District Court, the Magistrate's Role is Unconstitutional Under the 'Adjunct' Model

"Judicial power" conferred on the courts by Art. III is the right or duty to determine "cases and controversies" —"the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Muskrat v. United States*, 219 U.S. 346, 357 (1911). While the Court has upheld the use of magistrates as well as administrative tribunals to assist the district courts in preliminary factfinding or in the determination of preliminary civil and criminal matters, it

has never sanctioned the *substitution* of such assistants for district judges in the ultimate determination at a felony trial of "cases and controversies" subject to the judicial power.

In *Mathews v. Weber*, 423 U.S. 261 (1976), the Court, while not reaching any constitutional issue, merely sanctioned the use of magistrates to conduct a "preliminary review" of records regarding medicare reimbursement under the Social Security Act for the purpose of doing "no more than propos[ing] a recommendation" which the district judge was "free to follow . . . or wholly to ignore." *Id.* at 270-71. "The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge." *Id.* at 271. The Court "categorically reject[ed] the suggestion that judges will accept, uncritically, recommendations of magistrates." *Id.* at 274.

In *United States v. Raddatz*, 447 U.S. 667 (1980), the Court rejected a constitutional attack upon the use of magistrates to hear and to recommend dispositions of pretrial suppression motions in criminal cases. The Act's detailed scheme withstood the Court's scrutiny because it requires magistrates to "submit to a judge of the court *proposed* findings of fact and *recommendations* for the disposition, *by a judge of the court*," of the motion, 28 U.S.C. § 636(b)(1)(B) (emphasis added), and grants the parties *de novo* review of the matters to which they make specific objection. This statutory scheme does not violate Art. III, the Court held, "so long as the ultimate decision is made by the district court." 447 U.S. at 683.

In his concurring opinion, Justice Blackmun further emphasized the necessity for the Art. III judge to exercise a meaningful role:

> We do not face a procedure under which 'Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact.' *Post*, at 703 (dissenting opinion). Rather, we confront a procedure under which Congress has

> vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.

Id. at 686 (concurring opinion).

Even in the administrative adjunct cases, the Court also has been careful to reserve for the Art. III judiciary the power ultimately to determine the constitutional or Art. III issues presented, although the district judge may defer to factual determinations of "public rights" by specialized administrative or "legislative" tribunals created by Congress under Art. I. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. at 2796. Thus, in *Crowell v. Benson*, 285 U.S. 22 (1932), the Court required that a district judge make an independent determination of facts relating to an administrative agency's jurisdiction to adjudicate a maritime dispute. While the Court subsequently cut back on *Crowell* by holding that, in reviewing the factual findings of an "expert legislative agency" against a constitutional claim, a district judge could exercise his discretion to accept such "expert" findings without conducting a new hearing, the Court did not relieve the district judge of his "judicial duty to exercise an independent judgment." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (quoted in *Raddatz*, 447 U.S. at 683).

In *Northern Pipeline*, the plurality enforced the principle that "adjuncts" must assist, not replace, Art. III judges by invalidating the Bankruptcy Act of 1978, which created what Congress termed an "adjunct" court to determine bankruptcy-related matters, subject only to appeal to an Art. III court. In its analysis, the Court initially pointed out that it had "sustained the use of adjunct factfinders . . . so long as those adjuncts were subject to sufficient control by an Art. III district court." 458 U.S. at 78-79. Thus, it was "[c]ritical" (*id.* at 83) in *Raddatz* that "the ultimate decisionmaking authority

respecting all pretrial motions clearly remained with the district court." *Id.* at 79. Indeed, the Court observed that Congress may only authorize assignment of "limited adjudicatory functions" to adjuncts. *Id.* at 77 n.29. The Court stressed that review of an adjunct scheme must consider the "critical difference between rights created by federal statute and rights recognized by the Constitution," *id.* at 83, and further noted:

> [S]ubstantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Id. at 84.

Regardless of how Congress had characterized the function of the bankruptcy court, the Court continued, by authorizing it to "exercise all ordinary powers of district courts, including the power to preside over jury trials," subject to Art. III review only by a " 'clearly erroneous' standard," Congress had left the district court's role a "facade." *Id.* at 85-86. In this regard, the Court rejected "the proposition that Art. III is satisfied so long as some degree of appellate review is provided," explaining: "Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." *Id.* at 86 n.39; *see Crowell*, 285 U.S. at 57.

Because the "adjunct" scheme in this case involves the *trial* of a felony case, as opposed to pretrial civil (e.g., *Mathews*) or criminal (e.g., *Raddatz*) proceedings or a private civil dispute related to a specialized regulatory scheme (e.g., *Northern Pipeline*), Art. III scrutiny must be at its zenith.

The Framers left no doubt that they viewed criminal trials as the ultimate exercise of Art. III power. Art.

III safeguarded the right to trial by jury in criminal cases only. As Alexander Hamilton explained:

> . . . I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question.

Federalist No. 83 (A. Hamilton) (New American Library ed. 1961), at 499. *See id.* at 508 ("the security of liberty is materially concerned only in the trial by jury in criminal cases").

While the result of a pretrial suppression or other motion may "determine the outcome of the case," *Raddatz*, 447 U.S. at 678, the government argued in *Raddatz*,[7] and the Court agreed, "that the interests at stake . . . are of a lesser magnitude than those in the criminal trial itself." *Id.* at 679. "We have repeatedly pointed out," the Court stated, "that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence" and have " 'nothing whatever to do with improving the reliability of jury verdicts.' [*Lego v. Twomey*, 404 U.S. 477, 486 (1972)]." *Raddatz*, 447 U.S. at 678 (footnote omitted). Pretrial suppression procedures evolved long after the Constitution was adopted as a means principally to regulate conduct by the police during the investigatory, as opposed to the accusatory, stage of the criminal process. *United States v. Leon*, 468 U.S. 897, 906 (1984); *Johnson v. New Jersey*, 384 U.S. 719, 730-31 (1966).

[7] The primary interest at stake in a suppression hearing is "deterrence of official misconduct" rather than "the accused's paramount interest in liberty" that is at stake at the trial. Brf. for United States 45, *United States v. Raddatz*, 447 U.S. 667 (1980). "[T]he suppression remedy is ordinarily concerned with the deterrence of official misconduct or other societal interests and not with the more fundamental determination of guilt or innocence." *Id.* "Indeed, the defendant's stake in the outcome of a suppression hearing is significantly less than the individual interests implicated by various civil proceedings." *Id.* at 46.

In contrast, this Court hardly needs reminding of the importance of felony *voir dire*: "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, radical, or political prejudice." *Gomez*, 109 S. Ct. at 2246 (citations omitted). *See, e.g., Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Rejecting the Solicitor General's trivialization of the process,[8] the Court in *Gomez* stated:

> Far from an administrative impanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. See, *e.g., Wainwright v. Witt*, 469 U.S. 412, 428, n.9 (1985) (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57 (1879)).

Gomez, 109 S. Ct. at 2247.[9]

The power to select the jury itself is integral to the ultimate criminal law objective of "improving the reliability of jury verdicts," which depends upon the pres-

[8] *See* Brief for United States 34, *Gomez v. United States*, *supra* ("the *voir dire* process in the federal system consists for the most part of excusing prospective jurors when, in response to a question, they expressly acknowledge their inability to be impartial").

[9] Notwithstanding this resounding rejection of its argument, the Solicitor General in *United States v. France* again belittled *voir dire*, arguing that there was no constitutional distinction between the practice of having clerks initially screen prospective jurors for various disqualifying causes and "the screening process that occurs during *voir dire*." Reply Brief for United States 13 n.10.

ence of "an impartial adjudicator." *Gomez*, 109 S. Ct. at 2248 (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)). *See Brown v. Louisiana*, 447 U.S. 323, 334 (1980) ("Any practice that threatens the jury's ability properly to perform [its truth-determining] function poses a . . . threat to the truth-determining process itself."). The delegation to magistrates of this "critical stage" of trial, *Gomez*, *supra*, thus implicates fundamental Art. III interests. The regular use of such a procedure would make "substantial inroads into functions that have traditionally been performed by the Judiciary." *Northern Pipeline*, 458 U.S. at 84. It is thus essential that, at the very least, the district judge make a "final determination" regarding the fitness of the jury to serve by conducting an independent review of the process by which the magistrate selected the panel.

However, such a review not only is inherently impossible; the statute does not authorize it, and the judge in petitioner's trial did not offer to, let alone conduct, it. Thus, the magistrate's exercise of authority was "final"; he, not the judge, exercised the "judicial power."

The Court's unanimous opinion in *Gomez* expressed "serious doubts that a district judge could review this function meaningfully." 109 S. Ct. at 2247. After reviewing the inherently subjective nature of the *voir dire* process, the Court noted that "only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." *Id.* Indeed, the Court previously has likened the trial judge's factfinding role during *voir dire* to

> . . . that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.

Rosales-Lopez v. United States, 451 U.S. at 188. Thus, the trial court must be "accorded ample discretion in determining how to conduct *voir dire*," *id.* at 189, with resolution of questions concerning the credibility and demeanor of a prospective juror entitled to " 'special deference.' " *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying."). A district court reviewing a *voir dire* transcript, like an appellate court, would necessarily have to defer to the subjective perceptions and ruling of the magistrate.

Besides focusing on the qualifications of individual jurors, the court at *voir dire* also must be sensitive to group dynamics, such as whether a prejudicial comment has had an effect upon the entire venire, or whether a panel has been tainted by pretrial publicity. *Irvin v. Dowd*, 366 U.S. 717 (1961). The court may have to evaluate whether to apply a controversial or expensive remedy, such as outright dismissal, change of venue, sequestration of jurors, closure of the proceeding, or postponement of the trial. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512-13 (1984). It also may have to evaluate a prosecutor's subjective motivations in exercising peremptory challenges, a function that impacts upon separation of powers, given the prosecutor's status as a representative of the Executive Branch. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

Aside from discrete errors identifiable from the face of a transcript, the proceedings at jury selection may impact the balance of the trial in a manner that neither the parties nor a reviewing district judge could possibly anticipate. Evaluation of subsequent taint or misconduct allegations requires the trial judge to consider a juror's behavior and personality as revealed during *voir dire*, as well as the candor of his *voir dire* disclosures. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 212 n.4 (1982) (nondisclosure of juror's midtrial employment application to

prosecutor's office did not require new trial where trial court had relied upon that juror's detailed *voir dire* disclosure of his general law enforcement background and interest); *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988) (conviction reversed where trial court erroneously disqualified holdout juror for personality quirks that had been apparent during the *voir dire*). In preparing his charge, in ruling upon a defendant's objection that other-crime, impeachment or co-conspirator hearsay evidence would unfairly prejudice, confuse or mislead the jury, Fed. R. Evid. 403, 404(b), 608(b), 609, in weighing the need for and effectiveness of remedial measures such as limiting instructions, Fed. R. Evid. 105, or a mistrial, Fed. R. Crim. P. 14, the trial judge must rely upon his knowledge of the juror's intellectual and emotional functioning. His absence during jury selection may affect his control of the trial, and "is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself." *United States v. Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting).

Even if a procedure could be devised for the district court to identify erroneous actions by a magistrate during *voir dire*, there would be no effective means for redressing them. The district judge could not know the full effect, which "may persist throughout the trial," *Gomez*, 109 S. Ct. at 2247, of an erroneous instruction or a prejudicial remark. Nor could he effectively requestion specific jurors or the group. "[A]s a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Gomez*, 109 S. Ct. at 2247 n.29. By the time a transcript was prepared and reviewed by the district court, challenged jurors already would have been reassigned to other courtrooms or excused altogether from further service. Meanwhile, respective counsel's selection strategies would have been unalterably affected. Finally, such a review process would emphasize the court's view of

the critical *voir dire* process as "essentially clerical." *United States v. Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting) (cited approvingly in *Gomez*, 109 S. Ct. at 2247 n.29).

The reviewability of jury selection and of the pretrial procedures that were at issue in *Mathews* and *Raddatz* "differs palpably." *Gomez*, 109 S. Ct. at 2247 n.29. In *Mathews*, the Court merely upheld magistrates' "preliminary review—which district judges easily may examine before making a final decision—of 'closed administrative record[s]' in Social Security cases." *Id.* In *Raddatz*, the Court approved a careful statutory scheme providing for an independent district court determination in all cases, ample opportunity for the parties to obtain and review a hearing transcript and to make considered, written objections, and *de novo* review where requested. In contrast to the *voir dire*, a district judge can rehear suppression hearing testimony without concern for "engendering prejudices irrelevant to the facts adduced," *Gomez*, 109 S. Ct. at 2247 n.29, the group dynamics of a jury, or any inseparable relationship between the hearing and the trial.

Because a district judge cannot meaningfully review or correct *voir dire* conducted by a magistrate, the magistrate's role is, in effect, to make a "final determination." The magistrate conducts the substantive role of selecting the jury that will determine the ultimate question of guilt or innocence, and then refers the panel to the district judge to exercise the ministerial role of swearing it in. Under this perverse scheme, the magistrate exercises the "judicial power"; the Art. III judge becomes a functionary.[10]

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[10] The second circuit's recent decision on remand in *United States v. Alvarado*, 923 F.2d 253, 1991 U.S. App. Lexis 638 (2d Cir. 1991), perfectly illustrates this irony. This Court had vacated the court of appeals' denial of the defendant's *Batson* claim for reconsideration, 110 S. Ct. 2995 (1990), *vacating* 891 F.2d 439 (2d Cir. 1989). Upon remand, the court of appeals recognized that "the ultimate issue of whether discrimination has been shown, falls primarily

Nevertheless, the Court need not decide whether *any* statutory review procedure could possibly satisfy the Art. III requirement that the district court independently determine the composition of the jury. It merely need hold that § 636(b)(3), under which a magistrate may preside at felony *voir dire* without any "procedural guidance or judicial review," *Gomez*, 109 S. Ct. at 2246, violates Art. III.

The Court cannot "fairly" construe this statute to save its constitutionality by incorporating review procedures that Congress pointedly omitted. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See Schor*, 478 U.S. at 841; *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972) (legislature, not courts, must promulgate hearing procedure to save constitutionality of statute). *Gomez* concluded that jury selection is a "dispositive"-type matter for which *de novo* review must be provided, 109 S. Ct. at 2246, but Congress only authorized *de novo* review for the functions specified in § 636(b)(1)(B). The 1976 amendment that incorporated this provision into the Act was intended to "emphasize[] and clarif[y] when a de novo determination must be made by the judge." H. R. Rep. No. 1609, at 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 6163. Since Congress deliberately withheld any review structure for the functions authorized by § 636(b)(3), including felony *voir dire*, it is for Congress to rewrite the statute, not the courts. *See Aptheker v. United States*, 378 U.S. 500, 515 (1964).

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upon the judicial officer conducting the jury selection, whose determinations as to the credibility of the proffered explanations are entitled to 'appropriate deference.' *Batson*, 476 U.S. at 98 n.21." 1991 U.S. App. Lexis 638, at *10*. Since a magistrate had conducted the *voir dire*, the court of appeals remanded directly to the magistrate to exercise his "judicial" discretion in determining the credibility of the prosecutor's "race-neutral" explanation, and directed the district judge "either to reinstate the judgment of conviction or order a new trial, depending upon the Magistrate's findings." *Id.* at *12*. Under this role reversal, the magistrate will determine whether the defendant should receive a new trial; the district judge *qua* functionary will simply enter the magistrate's order.

Even if it is assumed *arguendo* that the district court could have promulgated a local rule under § 636(b)(4) to provide for independent review, it did not do so here. The sole authority for the delegation of felony *voir dire* to magistrates under the local rules was a general reference to "the duties set forth in 28 U.S.C. § 636." *Gomez*, 109 S. Ct. at 2239 n.3 (citing Fed. Local Ct. Rule 1 (E.D.N.Y. 1988)).[11] Nor, in the end, did the district judge conduct any review before swearing in the jury and beginning to receive testimony. Thus, in petitioner's trial, because the magistrate instead of the district judge exercised judicial power during the "critical" jury selection stage, Art. III was violated.[12]

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[11] *Compare* 28 U.S.C. § 636(c)(2), requiring each district to promulgate local rules ensuring the voluntariness of litigant waivers in civil cases.

[12] If magistrates may exercise ultimate adjudicatory authority at the trial of a felony case, a serious Appointments Clause issue also arises, which petitioner may assert for the first time in this Court. *Glidden Company v. Zdanok*, 370 U.S. 530, 536-37 (1962). Under Art. II, § 2, cl. 2, "principal" officers, who include Art. III judges, must be appointed by the President with the "Advice and Consent of the Senate," while the "Courts of Law" may be empowered by Congress to appoint "inferior Officers, as they think proper." *See generally Morrison v. Olson*, 108 S. Ct. 2597, 2608-09 (1988); *Buckley v. Valeo*, 424 U.S. 1, 120-25 (1976). In *Buckley*, the Court explained that a "principal" officer is "any appointee exercising significant authority pursuant to the laws of the United States." *Id.* at 126. If magistrates may preside, without being subject to meaningful district court review, at felony trials, in addition to their explicit statutory authority to conduct all civil and misdemeanor trials with consent and to adjudicate all pretrial motions, they must be deemed "principal" officers, since their jurisdiction would not be substantially distinguishable from that of district judges. *See, e.g., Morrison, supra.* As for magistrates' tenure, they can hardly be viewed as "temporary" officers given their eight-year terms of office and their protection against removal by the judiciary except for cause. *Id.* Even without considering magistrates' felony trial jurisdiction, powerful dissenting voices have been heard that magistrates' civil trial jurisdiction goes too far to be consistent with the limitations of the Appointments Clause. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting); *Pacemaker*

C. Even if the *Schor* Balancing Test Were Applied, Congress' Minimal Interest in the Delegation to Magistrates of Felony *Voir Dire* is Far Outweighed by the Harm to Article III Concerns

Even if the Court looks outside the "adjunct" model to the analysis it has applied to "legislative" courts, the delegation of felony *voir dire* to magistrates cannot be upheld. In *Schor* and in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld Congress' exercise of Art. I power to set up specialized regulatory agencies with responsibility to adjudicate disputes arising directly out of substantive regulatory provisions as well as ancillary, common-law claims. Acknowledging its troubled history of attempts to reconcile Congress' exercise of Art. I regulatory responsibilities with the requirements of Art. III, *Schor*, 478 U.S. at 847, the Court established a pragmatic balancing test.[13] Under this new framework, in each case, Congress' Art. I interest in establishing an inexpensive, expeditious dispute resolution process for claims arising out of or ancillary to a specialized regulatory scheme must be weighed against the interests underlying Art. III. In both *Schor* and *Thomas*, the Court limited its holding to the situation presented: Congress' need to adjudicate claims incident to its regulatory scheme in an Art. I forum.[14]

Diagnostic Clinic of America v. Instromedix, Inc., 725 F.2d 537, 549-50 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting).

[13] The *Schor/Thomas* "pragmatic" approach has been criticized within the court, *see Granfinanciara, S.A. v. Nordberg*, 109 S. Ct. 2782, 2805 (1989) (Scalia, J., concurring), and without, *see* Saphire, *Shoring Up Article III: Legislative Court Doctrine in the Post-CFTC v. Schor Era*, 68 B.U.L. Rev. 85 (1988).

[14] In *Thomas*, the Court stated: "Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U.S. at 593-94. In *Schor*, the Court's holding was as follows: "We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of power principles or Article III." 478 U.S. at 857.

In this case, there is no clash between Art. III interests and a specific grant of a competing power to Congress under which Congress may create an administrative or "legislative" court. This case is simply about whether Congress may authorize the judiciary to assign ultimate adjudicatory authority in a felony case, which the text of Art. III requires to be exercised by a judge with life tenure and an irreducible salary, to an "adjunct"-assistant who, though within the judicial branch, lacks such guarantees of independence.

Even if *Schor*'s balancing approach were applied to this case, petitioner must prevail because the Art. III values at stake far outweigh Congress' sole interest: limiting the federal judiciary's budget. The principal structural interest underlying Art. III is protection of the power of the Judicial Branch against encroachment by a coordinate branch of government. *Schor*, 478 U.S. at 848. Magistrates are hired by the judges of the individual district, who also maintain general supervisory authority as well as the power in each instance to determine the appropriateness of assigning a particular function. Nevertheless, magistrates are susceptible to influence by the other branches. Congress twice has worked major amendments to the Act, and is free to reduce the number of magistrates' positions, reduce magistrates' salaries,[15] reduce their responsibilities, or even wrest away control over their hiring from the judiciary. Without the security of lifetime tenure, a magistrate desirous of reappointment or of promotion to a district court

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[15] In 1983, a bill was proposed in Congress that would have reduced magistrates' annual salaries by about $15,000. *See* H.R. 3, 98th Cong., 1st Sess., *reprinted in Bankruptcy Court Act of 1983: Hearings on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 215 (1983).

judgeship may be influenced by a desire to please a powerful United States Attorney, influential members of the private bar, or the local United States Senator.[16]

Also underlying Art. III is the recognition that since Colonial times, "especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). As Justice Brennan emphasized:

> Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.
>
> It follows that the conduct of the trial is preeminently a matter of public interest. . . .

Richmond Newspapers, 448 U.S. at 595-96 (concurring opinion) (footnote omitted).[17]

Especially in the context of criminal prosecutions, the Court repeatedly has recognized that the trial judge has a responsibility to protect societal interests which may

[16] That magistrates may view their position as a stepping-stone to a judgeship is illustrated by this case: the magistrate who presided during the *voir dire* has since been appointed a judge in the Eastern District of New York. This is not to imply that she was consciously influenced in any ruling by a desire for career advancement. Nevertheless, the potential for such influence is at odds with Art. III.

[17] Justice Brennan's comments are relevant here even though this is not a First Amendment case.

transcend the narrow concerns of the parties. Thus, in *Richmond Newspapers*, the Court held that the public's interest in an open trial may outweigh a defendant's desire, with the prosecutor's acquiescence, to avoid the public eye. Similarly, a federal judge may be required to disqualify defense counsel with a potential conflict of interest, despite the defendant's waiver, because of the court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988); *see also Faretta v. California*, 422 U.S. 806, 839 (1975) (Burger, J., dissenting) ("the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel"); Fed. R. Crim. P. 44(c). Societal interests in the outcome of criminal proceedings require a federal judge, regardless of the stipulations of the parties, to independently review plea (Fed. R. Crim. P. 11) and charge (Rule 48(a)) agreements, to consider any potential "danger to . . the community" posed by a defendant's pretrial release, 18 U.S.C. § 3142(b) and (g)(4), and, in imposing sentence, to consider the societal need to "promote respect for the law," deter others, and "protect the public." 18 U.S.C. § 3553; 28 U.S.C. § 994(c); United States Sentencing Commission, *Guidelines Manual*, Ch. 6, Part B (Nov. 1990). The court has an independent obligation to disqualify itself, which a criminal defendant may not waive, under circumstances that give rise to an irrebutable presumption of interest or bias. 28 U.S.C. § 455(b), (e).[18]

The public interest in the integrity of the federal criminal trial process is also served by the freedom which Art. III's tenure and salary provisions give judges to

[18] Thus, a defendant may raise such an issue on appeal even if he has impliedly waived it by entering a guilty plea. *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 466 U.S. 1044 (1988).

act according to their consciences, without interference from other judges. "The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well. . ." *Northern Pipeline*, 458 U.S. at 59 n.10. *See Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970) (independence from other judges required in "any phase of the decisional function"); *id.* at 136 (Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 532 (1932) (a federal judge must be " 'perfectly and completely independent, with nothing to influence or control him but God and his conscience. . .' ") (quoting Chief Justice Marshall, Debates of the Virginia State Convention of 1829-30, at 616, 619); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979). Rather than act according to his conscience, a magistrate must be concerned not only with Congress' power to eliminate his position, redefine the scope of his duties, or reduce his salary, but with the judiciary's power to do so as well, thereby encouraging "a risk-averse strategy of adjudication . . . inconsistent with the broader policy of autonomous adjudication within the federal courts that underlies the Article III judicial office." Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1056-57 (1979) (footnotes omitted) (hereinafter "Yale Note"); *see Pacemaker*, 725 F.2d at 548-49 (Schroeder, J., dissenting).

Where magistrates exercise preliminary adjudicatory authority in a purely advisory capacity, or even in a final capacity in proceedings in which society generally has a less serious interest, public acceptance of the process and its outcome is far more likely than where final adjudicatory authority is delegated for all, or a critical stage of, a felony trial.[19] Where the jury acquits or convicts the

[19] This case, of course, does not present the question of the constitutionality of magistrates' consent trial jurisdiction in misdemeanor or civil cases. Although the government will undoubtedly raise the spectre of wholesale invalidation of the Magistrates Act,

defendant in one of the increasing number of federal capital cases, or in a serious narcotics case such as petitioner's, the public is less likely to respect the outcome where an assistant of the district judge has presided. An erosion of public acceptance of judicial proceedings would directly impact upon the federal judiciary, for "judges who invoke the Constitution daily and depend on it for their power to check the other branches of government can ill afford an erosion of public respect for their unique constitutional qualifications." Yale Note, *supra*, at 1057 (footnote omitted).

Congress' principal interest in the magistrates' system —avoiding creation of additional, more expensive life-tenured judgeships—has been and will be amply served

the holding we seek would not require such a result. It was obvious to the Framers, who refrained from extending Art. III's right to trial by jury to civil cases and the Fifth Amendment's right to indictment to misdemeanors, and to Congress, which withheld general felony trial jurisdiction from magistrates, that the individual and societal interests in the procedures by which felonies are tried, and in the outcome, are far greater than in misdemeanor prosecutions and civil cases. *See Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 16 (1966) (staff memorandum) ("When a crime reaches a certain level of seriousness, the Constitution guarantees the accused that the trial be by jury, before an Article III judge."). Threats to independent decisionmaking from within as well as from without the judicial branch are likely to be greatest in felony prosecutions, and the need for public acceptance of judicial decisionmaking, especially unpopular decisionmaking, is also at its peak. There is an additional clear distinction between civil and criminal matters: the parties may settle civil disputes, or bring them to alternative forums, but the public's interest in the administration of criminal justice requires the court to supervise the resolution of all criminal prosecutions. *See supra* at 32-33. Even if the Court ultimately were to invalidate additional areas of magistrates' consent trial jurisdiction, it could limit the availability of collateral attack. *See infra* at 40 n.21. Meanwhile, Congress could cure the constitutional difficulty by converting magistrates into lesser Art. III officers, appointed by the President and confirmed by the Senate, with lifetime tenure and irreducible salaries. *See* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697, 716-17 (1974).

through the delegation of functions other than felony *voir dire*. The latest statistics of the Magistrates Division, Administrative Office of the United States Courts, show that in the year ended June 30, 1990, magistrates disposed of a total of 450,565 matters, including 87,682 petty offenses, 13,248 misdemeanors, 4,958 civil cases, 167,382 preliminary proceedings, and a total of 177,295 "additional" civil and criminal duties other than trials. *See* letter from John Thomas Jones, Chief, Division of Magistrates, to counsel for petitioner (March 1, 1991) (a copy of which has been lodged with the Court). During this same period, magistrates conducted felony *voir dire* in only 97 cases. *Id.* While this number undoubtedly was influenced by the uncertain legal status of such proceedings after *Gomez*, even prior to that decision, during the year ending June 30, 1989, magistrates conducted a national total of only 154 felony jury selection proceedings. *Id.* While it is likely true that this Court's approval of magistrates' consent jurisdiction over felony *voir dire* would spur a significant increase in the district court's use of this procedure, it would hardly serve Congress' overriding purpose to free Art. III judges to concentrate on their most important adjudicatory duty, the trial of felony matters. *See* discussion of legislative history in *Gomez*, 109 S. Ct. at 2244-45 and n.23. The absence anywhere in the legislative history of any intent by Congress to authorize felony *voir dire* delegation demonstrates the procedure's lack of importance to Congress. Meanwhile, the inherently cumbersome *de novo* review process that is essential at a minimum to save this procedure's constitutionality, *see Gomez*, 109 S. Ct. at 2247 n.29, would result in little, if any, savings in judicial energy or time. To the contrary, some criminal defendants might capitalize upon the inherent difficulties in this process to delay trials and to develop appellate issues.

Finally, even if the use of a magistrate to conduct felony *voir dire* can be justified under the *Schor* balancing test, there still must be a statutory procedure affording independent Art. III review. Independent district court review of administrative "adjunct" factfinding —a form of "legislative" court—is required under Art. III. *See, e.g., Schor*, 478 U.S. at 853; *Northern Pipeline*, 458 U.S. at 69-70 n.23; Administrative Procedure Act, 5 U.S.C. §§ 701-706; cases discussed *supra* at 20. Since independent review of magistrate-conducted *voir dire* is not authorized by the statute and is unrealistic, the procedure cannot be upheld even under the "legislative" court model.

In sum, the interests underlying Art. III far outweigh Congress' minimal interest in the use of magistrates to conduct felony *voir dire*. This procedure can be prohibited without any harm to Congress' principal purpose to ease the workload of Art. III judges so that they can preside at felony trials.[20]

D. A Defendant's 'Consent' Cannot Validate a Magistrate's Exercise of Judicial Power that Exceeds Article III Limits

Individual litigants cannot "consent" to an officer's exercise of judicial power in violation of Art. III "for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Schor*, 478 U.S. at 851. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). "[N]otions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851.

In *Schor*, the Court recognized that, *in addition to* Art. III structural interests that a party may invoke on appeal regardless of his "consent," a litigant may also complain about violation of his *personal* interest in adjudica-

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[20] The Court also could prohibit the assignment of felony *voir dire* to magistrates under its supervisory power. *See generally Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 & nn.19, 21 (1987) (and cases cited therein).

tion by an Art. III tribunal. *Id.* at 848. In this case, petitioner asserts that his individual Art. III rights were violated because the court did not take any steps to assure that he was waiving his rights knowingly, intelligently and voluntarily. *See* Point III, *infra*. But even if petitioner's attorney's "consent" served to waive petitioner's *personal* Art. III rights, petitioner could not "legitimatize" a structural Art. III violation.

III. PETITIONER DID NOT FORFEIT HIS RIGHT TO APPEAL BECAUSE HIS ATTORNEY'S 'CONSENT' DID NOT COMPLY EITHER WITH STATUTORY OR CONSTITUTIONAL REQUISITES FOR WAIVER OF SUCH A BASIC CONSTITUTIONAL RIGHT

Consent is a "critical limitation" on whatever criminal trial jurisdiction is granted to magistrates. *Gomez*, 109 S. Ct. at 2244. Accordingly, "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Id.* at 2245; 18 U.S.C. § 3401. The legislative history establishes that Congress expressly adopted the "knowing, intelligent and voluntary" standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) for Art. III waivers in criminal cases. Even were that not the case, the Court's recognition in *Gomez* that jury selection is a "critical" stage of trial at which the defendant's right to the presence of a "person with jurisdiction to preside" is "basic," 109 S. Ct. at 2248, compels the conclusion that the *Johnson v. Zerbst* standard must apply. Petitioner's counsel's "consent" could not satisfy this standard. Nor could petitioner have knowingly waived a "right" that, under prevailing second circuit law, was not even recognized.

A. Since Magistrates Lack Any Consent Jurisdiction Over Felony *Voir Dire*, Petitioner's Right to Object on Appeal Was Immune From Forfeiture or Waiver

If Art. III precludes magistrates from exercising jurisdiction over the *voir dire* phase of a felony trial, regardless of the defendant's "consent", then this defect is immune from forfeiture or waiver. *See supra* at 37-38.

It is self-evident that a defendant cannot be required to object to preserve his right to appeal a substantial jurisdictional defect that is non-waivable. *See McClaughry v. Deming*, 186 U.S. 49, 66 (1902) (defendant's failure to object did not waive appellate challenge to improperly constituted military tribunal).

This same conclusion would be required even if the Court were to hold that the procedure is barred only as a matter of statutory construction. Congress alone possesses the power under Art. III to authorize the lower federal courts to exercise jurisdiction over matters to which federal judicial authority may extend. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 701. Thus, if Congress has withheld jurisdiction from magistrates to conduct felony *voir dire*, there is no other source of authority to empower a magistrate to preside. As Justice White wrote for the Court:

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

Id. at 702.

Because a party's explicit waiver is a prerequisite to a magistrate exercising his consent trial jurisdiction under the Magistrates Act, *a fortiori*, where Congress has withheld jurisdiction altogether there can be no stricter preservation requirement. The withholding of statutory authority amounts to the withholding of Art. III authority. Thus, the principle that no "consent" or "waiver" can overcome this constitutional defect applies.

This is not to say that the entire trial therefore lacks a jurisdictional basis, that the district court is deprived of jurisdiction to enter judgment, or that the judgment is thus void and subject to collateral attack.[21] To preserve petitioner's right to complain on direct appeal, it is enough to find, as the Court already did in *Gomez*, that the jurisdictional defect concerned a "critical" stage of trial and a "basic" right of the defendant.

B. Even if a Defendant in a Felony Prosecution Can Consent to Magistrate-Supervised *Voir Dire*, Such Consent Must be Knowing, Intelligent and Voluntary

If this Court concludes under the "additional duties" provision of the Magistrate's Act that a felony defendant may consent to magistrate-supervised *voir dire*, it must determine whether petitioner's attorney's "consent" in this case was sufficient. Absent a valid consent, a magistrate is not empowered under the statute or Art. III to exercise trial jurisdiction, nor can a litigant's right to contest the assignment on appeal be deemed forfeited.[22]

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[21] Principles of res judicata, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion), and retroactivity, *see Teague v. Lane*, 489 U.S. 288 (1989), may limit the availability of collateral attack.

[22] *See United States v. Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (defendant's written consent to misdemeanor trial by magistrate insufficient absent clear explanation on the record of his right to elect a jury trial in the district court); *United States v. Miller*, 468 F.2d 1041, 1043 (4th Cir. 1972) (same), *cert. denied*, 410 U.S. 935 (1973); *see also Clark v. Poulton*, 914 F.2d 1426, 1432-33 (10th Cir. 1990) (consent to civil trial jurisdiction must be explicit and voluntary); *Fowler v. Jones*, 899 F.2d 1088, 1092 (11th Cir. 1990) (same); *Colorado Building and Construction Trades Council v. B.B. Anderson Construction Co., Inc.*, 879 F.2d 809, 811 (10th Cir. 1989) (same); *Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987) (same); *Caprera v. Jacobs*, 790 F.2d 442, 444-45 (5th Cir. 1986) (same); *Archie v. Christian*, 768 F.2d 726 (5th Cir. 1985) (court of appeals on its own motion vacates judgment following civil trial where parties' implicit consent did not satisfy requirements of Magistrates Act); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984).

The "additional duties" provision, unlike the provisions for misdemeanor waivers under 18 U.S.C. § 3401(b) or for civil waivers under 28 U.S.C. § 636(c)(2), contains no guidance in this regard. Logically, the correct consent standard for trial jurisdiction should be no less exacting for felonies than for misdemeanors or civil cases. Such a construction would be consistent with Congress' express intention to incorporate the *Johnson v. Zerbst* constitutional standard for all waivers in criminal cases under the Magistrates Act.

Tit. 28, United States Code, § 636(a)(3), provides that magistrates "shall have . . . the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section." Section 3401(b) prescribes the mechanism by which a defendant charged with a misdemeanor may consent to trial by a magistrate:

> Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

The legislative history, consistent with the above statutory language, reveals Congress' intention to impose a rigorous consent requirement as a prerequisite to the magistrate's exercise of criminal trial jurisdiction:

> It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, "a knowing and intelli-

> gent waiver is necessary." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). [18 U.S.C. § 3401(b)], by requiring that the magistrate "carefully" explain the right to trial before a district judge and the right to jury trial before the district judge or the magistrate, incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506 (1962). In this regard, waiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived.

H.R. Rep. No. 287, 96th Cong., 1st Sess. 18 (1979). *See Gomez*, 109 S. Ct. at 2245 n.24 (citing 114 Cong. Rec. 27, 342 (1968) (remarks of Rep. Poff concerning necessity for specific, written waivers before magistrates may exercise criminal trial jurisdiction)).

Under *Johnson v. Zerbst*, a "waiver" that is not knowing, intelligent and voluntary cannot be effective to surrender the right involved. Where a *Johnson v. Zerbst* waiver is required, the burden is not on the defendant to object, but on the government to establish the waiver's sufficiency. Congress' intent to incorporate this caselaw establishes that a defendant's failure to object to substitution of a magistrate at felony *voir dire* does not forfeit his Art. III rights; only a knowing, intelligent and voluntary waiver will do. Since Congress also imposed a writing requirement to ensure further that a misdemeanor defendant's waiver is express and knowing, such a requirement should also be imposed in a more serious felony case as a matter of statutory construction.[23]

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[23] *See United States v. Aikins*, 912 F.2d 285, 288 (9th Cir. 1990), ("As *Gomez* recognizes, jury selection is a critical stage. If consent can confer authority to preside—a proposition doubted in *France*, 886 F.2d at 227—that consent must meet the minimal requirements of being specific and individual."), *modified*, 923 F.2d 650 (9th Cir. 1991); *United States v. Martinez-Torres*, 912 F.2d 1552, 1556 (1st Cir. 1990) (en banc) ("The statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negates waiver, even oral consent, by counsel for an uninformed defendant in a felony case.").

In addition to the consent requirements imposed by the statute, the Constitution independently requires that the waiver of such a basic structural trial right meet the *Johnson v. Zerbst* test. Express waivers made personally by criminal defendants traditionally have been required in circumstances implicating fundamental constitutional trial rights "which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977) (right to counsel); *id.* at 419 (1977) (Burger, C.J., dissenting) ("the rights to counsel and silence are personal, nondelegable, and subject to waiver only by the defendant"); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (waiver of trial-related rights cannot be presumed); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (blanket trial waiver of right of confrontation must be knowing, voluntary, and personally executed by defendant); *Johnson v. Zerbst*, 309 U.S. at 464 (right to counsel).

The above cases require that the requisite waiver reflect "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464. "Courts should 'indulge every reasonable presumption against waiver,' *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should 'not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937)." *Barker v. Wingo*, 407 U.S. at 525-26. *Accord Wheat v. United States*, 108 S. Ct. at 1698.

This caselaw has been incorporated not only into the Magistrates Act, but into numerous provisions of the Federal Rules of Criminal Procedure as well. *See, e.g.*, Fed.

R. Crim. P. 7(b) (waiver of indictment requires defendant's personal assent in open court "after having been advised of the nature of the charge and of the rights of the defendant"); Rule 11 (requiring extensive colloquy between court and defendant as requisite to guilty plea); Rule 23(b) (requiring written stipulation of parties with approval of court to permit jury of less than 12).

In *Gomez*, the Court equated a felony defendant's right to the presence of a competent tribunal at *voir dire* with other fundamental structural protections, such as the right to an impartial judge or jury. 109 S. Ct. at 2248. Indeed, the right to have a competent officer preside at a jury trial is inseparable from the right to trial by jury itseif. " 'Trial by a jury,' in the primary and usual sense of the term at the common law and in the American constitutions . . . [is a trial] in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them of the facts. . . ." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899). It has long been established that a defendant's waiver of the right to a 12-person jury in a felony trial must be "express and intelligent." *Patton v. United States*, 281 U.S. 276, 312-13 (1930). The same rule also applies to the waiver of a jury entirely. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). At least as strict a waiver rule must apply when the defendant is asked to give up his historic right to the presence of a fully independent Art. III judge at such a trial.

Our proposed rule would eliminate the concern the government expressed in *United States v. France* that a defendant might "sandbag" the court by acquiescing in or consenting to a procedure he intended to challenge on appeal. *See* Reply Brief for United States 6 & n.6. The requirement that waivers of fundamental rights be express, knowing and intelligent not only assures both the trial and the appellate courts that the defendant understood the important rights he was waiving, but it also "leaves a record adequate for any review that may be later sought." *Boykin v. Alabama*, 395 U.S. 238, 244

(1969). On the other hand, the failure to obtain such a consent may invite "collateral proceedings that seek to probe murky memories," *id.*, or may make it impossible to subsequently determine the defendant's subjective purpose. When a fundamental right is involved, a reviewing court should not simply presume that the defendant's "waiver" was purposeful rather than inadvertent, unknowing, ill-advised, or involuntary.

This is not a case in which a defendant can be required to assert his rights upon penalty of forfeiture. A "forfeiture" through failure to object or assert a right, which courts sometimes also term a "waiver," occurs when either (A) a non-fundamental procedural or evidentiary right is implicated, or (B) the execution of an express consent waiver is impractical because the right in question is not one "which must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker v. Wingo*, 407 U.S. at 529. The first situation may occur when a defendant fails to make a timely objection at trial to the introduction of arguably inadmissible evidence or to a judge's ruling. The second forfeiture category is involved when a defendant fails to call *particular* witnesses or ask *particular* questions on cross-examination, even though the rights implicated are fundamental. *Cf. Henry v. Mississippi*, 379 U.S. 442, 451 (1965) ("the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy" precludes subsequent assertion of constitutional claims). However, a *blanket* waiver of the right to compulsory process or the right to confront and cross-examine witnesses—like a waiver of the presence of an Art. III judge for the entire *voir dire*—must be established by a knowing and voluntary consent, as when a defendant agrees to a "prima facie" trial, *see Brookhart v. Janis*, 384 U.S. 1 (1966), or when a defendant pleads guilty, *see Boykin v. Alabama, supra.*[24]

[24] Waiver of certain constitutional rights that attach during the criminal investigatory stage under the Fourth, Fifth and Sixth

The argument that a defendant must explicitly object to preserve a right for which a *Johnson v. Zerbst* waiver is required would eviscerate the constitutional doctrine. It cannot be, for example, that a court with *counsel*'s "consent" can convict a defendant without a trial, or without a *jury* trial, and, if the defendant does not explicitly object, he forfeits his appellate rights. The same reasoning holds true for all rights that the Court or Congress has required must be explicitly waived under the *Johnson v. Zerbst* standard, including the right to the presence of an Art. III judge at felony *voir dire*.[25]

Amendments also may be required to be voluntary, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search), or knowing, intelligent and voluntary, *see Miranda v. Arizona*, 384 U.S. 436 (1966) (waiver of right to remain silent and to counsel), but later must be "raised or waived." The reason for this rule lies in the second category identified in *Barker v. Wingo:* practicality. Unless the defendant, through his objection, alerts the court to the occurrence of such a constitutional violation, the court cannot know, evaluate or remedy the error. *See also Davis v. United States*, 411 U.S. 233 (1973) (defendant's failure to alert court to claim of discriminatory selection of grand jury under Fed. R. Crim. P. 12(b) forfeits issue). On the other hand, in every instance in which a court considers delegating jury selection to a magistrate, the court knows of the constitutional rights involved and can easily conduct a careful waiver procedure.

United States v. Gagnon, 470 U.S. 522 (1985), also is consistent with our position. Contrary to this case, the Court found that no fundamental right was implicated by the trial court's brief *in camera* discussion with a juror in defense counsel's presence, but the defendant's absence. *Id.* at 526. Moreover, in view of Fed. R. Crim P. 43's requirement that waiver be presumed when a defendant "voluntarily absents himself" from a trial proceeding, the defendant's failure to object to the procedure, which he knew about, could be deemed a waiver. *Id.* at 528-29.

[25] If petitioner is correct either that the error in this case was non-waivable or that, if waivable, the requisite standard was not met, then "plain error" analysis—the means for determining whether *unpreserved* error may be redressed on appeal—is irrelevant. However, even under the exacting standard for establishing "plain error," *see United States v. Young*, 470 U.S. 1, 15-18 (1985), the Court should reach the merits because the unauthorized use of a non-Art. III officer to preside at a critical stage of a felony trial

In sum, *Gomez* already has resolved that the right involved in this case relates to a "critical" stage of trial and is "basic." No exigency or other circumstance made it impracticable for the district court to seek petitioner's personal, *Johnson v. Zerbst* waiver. The Court should hold that any waiver of a defendant's fundamental right to the presence at felony *voir dire* of an Art. III judge must be express, knowing, intelligent and voluntary, and that in the absence of such a waiver, a defendant does not forfeit his right to raise the issue on appeal.

C. Petitioner's Counsel's Agreement to Magistrate-Supervised *Voir Dire* Did Not Meet Constitutional Requirements

Judged against the applicable *Johnson v. Zerbst* standard of consent, whether required by the statute, the Constitution or both, defense counsel's agreement to magistrate-supervised *voir dire* was woefully inadequate.

The transcript of the October 14, 1988, appearance before the district judge contains the following colloquy regarding jury selection:

> THE COURT: Let's try to pick the jury Thursday morning. Any objection to picking the jury before a magistrate?
>
> MR. BREITBART: I would love the opportunity.
>
> THE COURT: Thank you very much.

(J.A. 2). This proceeding was so casual that no prosecutor was present. *See supra* at 2.

"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U.S. 157, 160 (1936), and, as *Gomez* holds, the error is so fundamental that it can never be deemed "harmless." 109 S. Ct. at 2248. Since the error here is jurisdictional in nature, it can be raised for the first time on appeal. *See Glidden Company v. Zdanok*, 370 U.S. 530, 536 (1962) (Court reaches Art. III issues, despite litigants' failure to make timely objection and the absence of specific prejudice, because "the alleged defect of authority . . . relate[d] to basic constitutional protections designed in part for the benefit of litigants" and in view of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"); cases discussed *supra* at Point II(C) and (D).

On January 6, 1989, prior to the commencement of jury selection, the magistrate asked petitioner's counsel, "I have the consent of your client to proceed with the jury selection?" and counsel responded, "Yes, your Honor." (J.A. 5).

These two colloquies surely did not establish that petitioner understood his right to have an Art. III judge present, that he understood the distinction between such a judge and a magistrate, or that he was intelligently and voluntarily waiving his rights. Indeed, at the time of petitioner's trial, the second circuit had held that a defendant had *no* right to the presence of an Art. III judge at felony *voir dire*, *see United States v. Garcia*, *supra*, and it was the practice to assign this function to magistrates even over the defendant's express objection. *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990). Petitioner hardly could have made "an intentional relinquishment or abandonment of a known right," *Johnson v. Zerbst*, 304 U.S. at 464, when the court of appeals had announced to the world that such a right did not exist.

It is also difficult to understand how petitioner could have made a knowing and intelligent waiver in the absence of any statutory guidance concerning the availability of *de novo* or independent district court review of the magistrate's rulings. *See supra* at 28. The district judge appeared to assume that he had no obligation to conduct any review. Counsel, who did not request review even though the magistrate had excused a juror on the government's challenge for cause over counsel's vehement objection, *see supra* at 2, likewise may have assumed his client had no such right in the absence of any such procedure in the statute or the local rules. Certainly petitioner, a stranger to the American criminal justice system and with only limited English language skills,[26] cannot be presumed to have understood

[26] Petitioner is an Israeli citizen who used a court interpreter throughout the proceedings.

what review rights he had or to have knowingly waived them.

In the absence of any express waiver procedure, it also cannot be assumed that the defendant's "consent" was voluntary. The district court's request for consent to assign this procedure to the magistrate certainly implied that this was its desire. Congress was so concerned with such inherent coercion by the court that it required, in civil cases, that the consent procedure be handled by a clerk, under local rules "includ[ing] procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(2); *see Gomez*, 109 S. Ct. at 2244. In a serious felony case such as petitioner's, the inherent pressure upon the criminal defendant to acquiesce is even greater. *See United States v. Aikins*, 912 F.2d at 288.

D. Harmless Error Analysis is Inapplicable to *Gomez*-Type Error

Finally, harmless error analysis cannot save this conviction. In *Gomez*, as here, no specific prejudice was alleged, yet the Court rejected the government's harmless error argument, holding:

> We find no merit to this argument. Among those basic fair trial rights that "can never be treated as harmless" is a defendant's "right to an impartial adjudicator, be it judge or jury." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

109 S. Ct. at 2248.

Although the defendant in *Gomez* lodged an objection, this fact was not necessary to the Court's holding. The applicability of harmless error analysis has never turned

on the means by which an issue has been preserved for review. The denial of a defendant's right to an impartial adjudicator under Art. III is equally unforgiveable in the *Gomez* context whether the defendant explicitly objected or simply did not give a conforming consent. As Justice Harlan wrote in *Glidden Company v. Zdanok*: "Article III, § 1, . . . is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record." 370 U.S. at 533.

Both the Magistrates Act and the Constitution preclude a finding that petitioner waived his right to assert on appeal the magistrate's erroneous supervision of *voir dire*. The error cannot be deemed harmless. Accordingly, petitioner's conviction must be reversed.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS

Article II, § 2, cl. 2 of the United States Constitution provides, in pertinent part:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article III of the United States Constitution provides, in pertinent part:

> **Section 1.** The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . .
>
> • • • •
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

The Fifth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Sixth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18, United States Code, Section 3401 provides, in pertinent part:

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(B) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

Title 28, United States Code, Section 636 provides, in pertinent part:

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a

criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A

judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedures for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(C) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

* * * *

Federal Rule of Criminal Procedure 1 states:

Rule 1. Scope

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Federal Rule of Criminal Procedure 24(a) states:

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Federal Rule of Criminal Procedure 25(a) states:

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Federal Rule of Criminal Procedure 54 states, in pertinent part:

Rule 54. Application and Exception

(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the

District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States . . .

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

* * * *

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York states:

Rule 1. Jurisdiction—28 U.S.C. Section 636

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.

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No. 90-615

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Court has directed the parties to address the following questions:

1. Does 28 U.S.C., Section 636, permit a magistrate to conduct the voir dire in a felony trial if the defendant consents?

2. If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial voir dire provided that the defendant consents, is the statute consistent with Article III?

3. If the magistrate's supervision of the voir dire in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 904 F.2d 34 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990. Pet. App. 5a-6a. The petition for a writ of certiorari was filed on October 10, 1990, and was granted on January 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III of the United States Constitution, the relevant provisions of the Federal Magistrates Act, 28 U.S.C. 636, and Rules 51 and 52 of the Federal Rules of Criminal Procedure are reproduced in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, one count of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of importation of heroin, in violation of 21 U.S.C. 952. The charges were based on petitioner's involvement in an effort to smuggle four kilograms of heroin from Thailand through J.F.K. International Airport in New York. Gov't C.A. Br. 3-9. The district court sentenced petitioner to a total term of 135 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. At a pretrial conference on October 14, 1988, the district court asked petitioner and his counsel whether they had "[a]ny objection to picking the jury before a magistrate." J.A. 2. Petitioner's counsel replied, "I would love the opportunity." *Ibid.* On January 6, 1989, the magistrate to whom jury selection had been assigned again asked petitioner's counsel whether "I have the consent of your client to proceed with the jury selection." Petitioner's counsel replied: "Yes, your Honor." *Id.* at 5. The magistrate

then proceeded to conduct the jury voir dire and to supervise the selection of the trial jurors.

After the jury was selected but before it was sworn, the parties met with the district court to discuss any unresolved pretrial matters. Petitioner did not object at that time to the magistrate's role in selecting the jury or to any specific ruling made by the magistrate during jury selection. J.A. 6-9.[1] It was not until petitioner filed post-conviction motions in the district court that he first complained about the magistrate's role in selecting the jury.

2. On appeal from his conviction, petitioner argued that it was error for the district court to assign the jury voir dire to a magistrate. He claimed that reversal of his conviction was required by this Court's decision in *Gomez* v. *United States*, 490 U.S. 858 (1989), which held that the Magistrates Act does not authorize district courts to delegate jury selection in felony cases to magistrates and that the supervision of jury selection by a magistrate was not subject to harmless error analysis.

The court of appeals affirmed. Pet. App. 1a-4a. Relying on prior Second Circuit decisions, the court of appeals held that petitioner's explicit consent to the magistrate's supervision of jury selection waived his right to raise that issue as a basis for obtaining reversal of his conviction.

---

[1] The magistrate's conduct of the voir dire was routine; there were only two points during the jury selection process on which there was any dispute between the parties at all. First, the magistrate excused one juror for cause over petitioner's objection. Jan. 6, 1989, Tr. 26. Second, the magistrate sustained petitioner's objection to one of the voir dire questions that the government had submitted. *Id.* at 4-6. (Petitioner has lodged the transcript of the jury voir dire with the Clerk of this Court.)

SUMMARY OF ARGUMENT

This is a waiver case. Petitioner argues at some length that permitting the magistrate to select the jury in this case was error. We agree with him that assigning jury selection to a magistrate is error even if, as in this case, it is done with the consent of the parties. The question on which issue is joined in this case is whether petitioner's failure to invoke his right to have a district court conduct voir dire bars him from obtaining relief.

The district court asked whether petitioner would consent to have the magistrate preside over jury selection. His counsel responded, "I would love the opportunity." The jury selection process was uneventful, and petitioner did not raise an objection before the district court to anything that the magistrate did in the course of jury selection. Thus, from all that appears, petitioner was not only satisfied with having the magistrate conduct jury selection, but preferred that option. It was not until after his conviction that petitioner reversed field and complained that the magistrate's role in jury selection was such fundamental error that, in spite of petitioner's enthusiastic acquiescence in the procedure, his conviction had to be voided and a new trial granted.

The court of appeals properly affirmed the conviction in this case on the ground of waiver. Petitioner could have answered "yes" when the district court asked whether he would object to having the magistrate play any role in jury selection, and if he had done so the court presumably would have conducted the jury selection itself. If the district court had assigned the voir dire to the magistrate over petitioner's objection, petitioner would have had a right to a new trial. See *Gomez* v. *United States*, 490

U.S. 858 (1989). Petitioner, however, did not object to the course of action proposed by the district court, apparently because he preferred having the magistrate conduct the voir dire, or at least was indifferent as to whether the voir dire was conducted by the magistrate or the district court. A third possibility, of course, is that petitioner's counsel hoped that the district court would assign jury selection to the magistrate so that it would seed potential reversible error into the proceedings.

There are sound reasons why a defendant would not object to, or would even welcome, having a magistrate conduct the voir dire. A particular magistrate may be more willing than the district judge to ask wide-ranging voir dire questions, may give the attorneys more leeway in conducting the jury selection process, or may have a reputation for being more willing to grant defense challenges for cause or less willing to grant challenges raised by the prosecution. Because petitioner expressed his preference for having the magistrate conduct the voir dire, and because there are valid reasons why he might have done so, he should be held to his choice. To grant a defendant a new trial in this situation would result in an unjustified windfall to a defendant who got exactly what he asked for at trial.

None of the grounds that petitioner advances is sufficient to excuse his failure to object to the magistrate-conducted voir dire in this case. First, the error is not "plain error" within the meaning of Rule 52(b), Fed. R. Crim. P., because there is no indication that the assignment of jury selection to the magistrate resulted in a miscarriage of justice in this case or seriously affected the integrity or public reputation of the judicial proceedings. Although this Court in *Gomez* held that the error of assigning voir

dire to a magistrate is not subject to harmless error analysis, that does not mean that it is always plain error. Because a defendant may have very sound reasons for wanting to have his jury selected by a magistrate, there is no reason to apply plain error principles, which are designed to avoid miscarriages of justice, to a case where the defendant chose the very course that the court followed.

Second, the *Gomez* Court's statement that a magistrate lacks "jurisdiction" to conduct jury selection refers to the magistrate's lack of authority to select a jury. It does not suggest that by assigning jury selection to a magistrate, the district court somehow loses subject matter over the cause before it and therefore loses the power to issue a binding judgment in the case.

Third, nothing in Article III of the Constitution requires reversal here. The assignment of jury selection to a magistrate, although violative of the Magistrates Act, did not also violate Article III. The magistrate served as an adjunct to the district court, subject to the court's close direction and control. If the parties had regarded the magistrate's performance as flawed in any respect, there were a variety of ways that the district court could have reviewed and corrected the magistrate's error, either by screening any disputed voir dire questions in advance, by interrupting the voir dire to make requested rulings, or, if necessary, by conducting part or all of the jury selection process anew. None of these devices was used, because none was needed. The fact that the parties were apparently quite content with the magistrate's work and therefore saw no reason to complain about the process is not evidence that the magistrate's performance was unreviewable and therefore fell outside the sphere of responsibilities that can constitutionally

be performed by an "adjunct" officer in aid of an Article III court.

Even if Article III grants a defendant the right to have a district court select the jury in a felony case, petitioner waived that right in this case. This Court has held that principles of waiver by the parties are not dispositive in the case of a violative of the "structural" component of Article III, *i.e.*, the protection against encroachments on the authority of the Judicial Branch in contravention of Article III. Waiver is fully applicable, however, when it is the "individual right" component of Article III that is at issue, *i.e.*, the right to adjudication by an independent officer enjoying tenure and salary protections. In this case, only the individual right component of Article III is at issue; the structural component of Article III is not involved, because the permissive delegation of responsibilities to a magistrate is entirely within the Judicial Branch and is subject to the discretion of the district court judge in each case.

Finally, petitioner's waiver of his right to have the district court preside over jury selection was valid, even though the consent to magistrate-conducted voir dire was given by petitioner's attorney, rather than by petitioner personally. Only a few trial rights are considered so fundamental that their waiver is invalid unless the waiver is made personally and intelligently. Those include basic rights such as the right to counsel, the right to go to trial, and the right to a trial by jury. Other trial rights, including rights of compulsory process and confrontation, rights to exclude illegally obtained evidence, and rights under the Rules of Evidence, are subject to waiver through the defendant's attorney and do not require a personal and intelligent waiver on the record from the defendant. The right in this case is not like the

fundamental and sweeping rights that can be waived only by the defendant himself, but is more akin to the standard trial rights that are routinely waived through the action or inaction of the defendant's counsel acting on his behalf.

ARGUMENT

I. THE MAGISTRATES ACT DOES NOT AUTHORIZE A DISTRICT COURT TO DELEGATE JURY SELECTION TO A MAGISTRATE IF THE DEFENDANT CONSENTS TO THAT DELEGATION

In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that the Magistrates Act, 28 U.S.C. 636, does not authorize magistrates to conduct jury selection in felony criminal cases over a defendant's objection. The Court pointed out that Act's "carefully defined grant of authority [to magistrates] to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Gomez*, 490 U.S. at 872. In addition, the Court noted that the Act contains no provisions for court review of a magistrate's decision during jury selection; the Court concluded that "it is unlikely that [Congress] intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review," *id.* at 873, provisions not found in the Act.

In *Gomez*, the Court framed the issue before it as "whether presiding at the selection of a jury in a felony trial without the defendant's consent" is among the duties that the Magistrates Act empowers magistrates to perform. 490 U.S. at 860. Accordingly, the holding of *Gomez* extends only to cases in which the district court delegated jury selection to a magistrate over the defendant's objection. See, *e.g.*, *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1545 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). Nevertheless, in light of the Court's analysis of the text and legislative background of the Act, we agree with petitioner (Br. 10-12) that *Gomez* forecloses the argument that the statute may be read to authorize magistrate-conducted voir dire when the defendant consents. The Magistrates Act, as construed by this Court, does not give magistrates the power to preside over jury selection. A defendant's consent cannot supply the statutory authority Congress did not provide.[2]

Because we agree with petitioner that the Magistrates Act does not authorize a magistrate to conduct felony voir dire on the defendant's consent, we have no occasion to discuss the second question that the Court directed the parties to address—whether the Magistrates Act violates Article III if it is construed to authorize a magistrate to conduct felony voir dire with the defendant's consent. In the course of our discussion of the waiver issue, however, we will address a related question, *i.e.*, whether the assignment of jury voir dire to the magistrate in this case violated Article III and, if so, whether the violation resulted in a jurisdictional defect in the proceedings that requires reversal of petitioner's conviction in spite of his consent to the procedure employed. We argue that there was no violation of Article III in

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[2] For that reason, we disagree with the Third Circuit's analysis in *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305 (1989), where that court concluded that "the assignment of voir dire to a magistrate on consent of the defendant * * * plainly qualifies as an 'additional duty' for purposes of [28 U.S.C. 636(b)(3)]." 892 F.2d at 311; see Pet. Br. 11-12. We agree with the result in *Williams*, however, because the consent to the magistrate's role in selecting the jury constitutes a waiver of the defendant's right to raise that claim on appeal, for the reasons set forth in part II of this brief.

this case and that even if there was, petitioner waived his Article III claim when he agreed to have the magistrate conduct the jury selection in his case.

II. PETITIONER FORFEITED THE RIGHT TO HAVE A JUDGE PRESIDE OVER VOIR DIRE BECAUSE HE AGREED TO THE MAGISTRATE'S ROLE IN SELECTING THE JURY

Petitioner concedes that he did not raise any objection in the trial court to having the magistrate conduct the jury voir dire. Indeed, petitioner's counsel told the district court that he "would love the opportunity" to have the magistrate preside over voir dire. J.A. 2. Moreover, the magistrate to whom jury selection was assigned later asked petitioner's counsel whether "I have the consent of your client to proceed with the jury selection." Petitioner's counsel replied affirmatively. *Id.* at 5. Having enthusiastically acquiesced in the magistrate's role in jury selection, petitioner may not now raise that issue as error and obtain a new trial.

Principles of waiver ordinarily do not permit a party to withhold objection to a particular procedure and then seek reversal on the ground that the procedure was improper. It thus follows that waiver principles do not allow a party to request or specifically agree to a particular procedure and then argue on appeal that the use of the agreed-upon procedure was unlawful, requiring that the party be granted a new trial. Those principles are well established because they serve the important goal of orderly trial procedure and because they are commonsense applications of a rule of basic fairness: a party may not lure the court into error and then seek reversal because the court did precisely what the party requested.

A. Ordinary Principles Of Waiver And Invited Error Require That Petitioner Be Denied Relief

1. *A defendant must object to a ruling at trial in order to preserve an objection for appeal*

"No procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as in civil cases by failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The principle providing for the forfeiture of legal claims in the absence of a contemporaneous objection is embodied in Federal Rule of Criminal Procedure 51. An error is presented under that Rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." *Hill* v. *United States*, 261 F.2d 483, 489 (9th Cir. 1958).[3]

This Court has applied the contemporaneous objection rule in a variety of contexts.[4] For example,

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[3] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order." Here petitioner and his counsel were fully aware of the trial court's delegation of jury selection to a magistrate, and they were not prohibited from making a timely objection to the procedure. To the contrary, petitioner's counsel was twice specifically asked if he wished to consent to the procedure and twice expressly stated that he did. J.A. 2, 5.

[4] Strictly speaking, Rule 51 sets forth a rule of forfeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul L. Rev. 753, 757-758 (1980). The term "waiver"

in *United States* v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers outside the presence of the defendants. The defendants did not object, but on appeal they argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 because "[n]o objections of any sort were lodged." 470 U.S. at 528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619; see also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence was forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure: Criminal 2d* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies to "all kinds of rulings at the trial").[5]

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often connotes the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

[5] The courts of appeals have consistently held that defendants forfeit statutory and constitutional rights if they fail to make an objection, unless the forfeiture results in a miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983).

The reasons that a defendant must make his views known to the trial court are familiar ones. First, the requirement promotes judicial economy. See *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.5, at 251 (1984). If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984). In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same charges.

Second, the contemporaneous objection rule requires the parties to declare themselves as to the action they want the court to take. As a matter of basic fairness, a defendant should not be able to pursue a certain course at trial for tactical reasons and, if convicted, later claim that the course followed by the court was reversible error. See 3 W. LaFave & J. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89.

This Court in *Wainwright* v. *Sykes* summarized the importance of the contemporaneous rule when it described a criminal trial:

> A defendant has been accused of a serious crime and this is the time and place set for him to be tried by a jury of his peers and found either

> guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

433 U.S. at 90.

2. The contemporaneous objection rule should be applied in this case

This case presents compelling reasons for applying the contemporaneous objection rule. Here, the Court can be confident that petitioner was happy to have the magistrate conduct the voir dire. Petitioner's counsel—in petitioner's presence—expressly agreed to have the magistrate preside over jury selection. J.A. 2. That tactical decision is readily understandable. Counsel may have believed that the magistrate would conduct a more thorough voir dire than a district judge, who might be distracted by other matters. Counsel may have concluded that the magistrate would be more amenable to the urging of counsel to ask particular questions of the prospective jurors or to permit counsel to play a greater role in voir dire proceedings. Or, counsel may have believed that the magistrate would be more willing than the district judge to grant for-cause challenges

to prospective jurors.[6] Counsel may even have agreed to the procedure because he hoped that the use of a magistrate, rather than a district judge, would create an error in the proceedings that could be raised if petitioner were convicted. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). To relieve counsel of the obligation to object allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly. See *Wainwright* v. *Sykes*, 433 U.S. at 89; *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976); *id.* at 515 (Powell, J., concurring).

Petitioner tries to gloss over his agreement to proceed with magistrate-conducted voir dire with the following excuse:

> In fact, prior to petitioner's trial, the second circuit held that a defendant had no statutory or constitutional right to the presence of the district judge at felony *voir dire*, *see United States v. Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez v. United States*, 109 S. Ct. 2237 (1989), and it was the "practice . . . in this circuit" to override a defendant's objection to assignment of this function to a magistrate, *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990).

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[6] Indeed, in this case, the magistrate sustained defense counsel's only substantive objection to the government's proposed voir dire questions. Jan. 6, 1989, Tr. 4-6. After the completion of the magistrate-conducted voir dire, the district court asked petitioner and the government about any "outstanding matters." J.A. 7. Neither then nor at any other time did petitioner's counsel complain about the magistrate's supervision of the jury selection or the qualifications of the jurors selected or excused during voir dire.

Br. 2-3; see *id.* at 47-49. But that is no excuse at all. The absence of an enforceable *right* to have the court conduct jury selection does not mean that the court was *required* to assign jury selection to a magistrate. Second Circuit law at the time of the trial authorized the court to assign jury selection to a magistrate; but it certainly did not compel that course of action. Thus, if petitioner did not want to have a magistrate select the jury, he had every reason to object to that procedure—both because the procedure might be struck down by this Court, as it later was,[7] and because the district court was free to honor petitioner's request and conduct the jury selection itself. Indeed, if the court had no intention of respecting petitioner's choice, it is difficult to explain why the court bothered to ask whether petitioner had "[a]ny objection to picking the jury before a magistrate," J.A. 2, and why the magistrate followed up by asking petitioner and his counsel whether the magistrate "had the consent of your client to proceed with the jury selection," *id.* at 5.[8] Moreover, even if petitioner's

[7] At the time of the jury selection in this case, the petition in the *Gomez* case had been filed, and the United States had acquiesced in the petition. In addition, the Fifth Circuit en banc had held that it was error to assign jury selection to a magistrate over the defendant's objection. See *United States* v. *Ford*, 824 F.2d 1430 (1987), cert. denied, 484 U.S. 1034 (1988).

[8] Petitioner states that it was the practice in the Second Circuit at the time to override a defendant's objection to the assignment of voir dire to a magistrate (Br. 2-3). But the district judge in this case did not simply override an objection, he solicited the defendant's views on the question. Likewise, the magistrate questioned counsel to ensure that the magistrate had petitioner's consent to act before beginning the jury selection process. The conduct of both the district court and

explanation for his conduct in the district court could excuse his failure to object to the court's proposal to assign jury selection to the magistrate, it does not account for his expression of preference for that procedure. In short, petitioner's current suggestion that he simply acquiesced, albeit reluctantly, in the inevitable is flatly at odds with his performance in the district court and should not be credited for that reason.

3. *The "invited error" doctrine applies in this case*

Because petitioner eagerly embraced the proposal to have the magistrate conduct the voir dire, this case is governed by the "invited error" doctrine. Under that doctrine, a defendant who requests or expressly agrees to a particular procedure forfeits the right to claim on appeal that the district court erred in using that procedure, even more conclusively than does a defendant who merely fails to object.

The rationale behind imposing an especially stringent standard for review of invited errors is that where a party has expressly agreed to a particular course of action, the court and the opposing party should be entitled to assume that any possible objection to that course of action has been abandoned. In addition, in cases in which the defendant or his counsel have requested or embraced a particular ruling, there is no risk that the defendant has been prejudiced by an oversight on the part of his attorney. Rather, it is clear that the defense has adverted to the issue and made a tactical choice with respect to it. Absent the most extreme circumstances, the defendant should be held to that choice.

the magistrate is quite inconsistent with an intention to assign jury selection to the magistrate regardless of what petitioner said in response to their inquiries.

See, *e.g.*, *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 & n.2 (8th Cir. 1990) (defendant could not challenge jury instruction he had requested); *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989) (defendant could not challenge admission of hearsay elicited on cross-examination, where that questioning resulted from his direct examination); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989) (defendant could not complain about admission of evidence where he elicited inadmissible testimony); *United States* v. *Rodriguez-Cardenas*, 866 F.2d 390, 395-396 (11th Cir. 1989) (defendants could not question absence of limiting instruction where "they made a strategic decision" at trial not to request one); *United States* v. *Oppon*, 863 F.2d 141, 145-146 & n.9 (1st Cir. 1988) (defendant could not challenge evidence he elicited at trial without objection). As in those cases, petitioner's affirmative endorsement of the magistrate's role in selecting the jury should bar him from obtaining reversal of his conviction, even if the Court believes that in the circumstances of this case a simple failure to object would not have that effect.

B. The Error In This Case Is Not "Plain Error" Or Otherwise Non-Waivable

Petitioner seeks to avoid this straightforward application of the contemporaneous objection and invited error doctrine by arguing that this Court in *Gomez* adopted a rule of automatic reversal whenever jury selection is delegated to a magistrate. This contention amounts to an argument that the assignment of jury selection to a magistrate is a "plain error" that is reviewable even in the absence of an objection. See Fed. R. Crim. P. 52(b).

1. *The "plain error" doctrine is inapplicable here*

The plain error rule set forth in Rule 52(b) permits a court to review "plain errors or defects affecting substantial rights" even in the absence of an objection by the party. The rule is a narrow exception to the contemporaneous objection rule, one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). It should be invoked "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). To satisfy this standard, a reviewing court ordinarily must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14.

Petitioner never suggested in the district court that the magistrate's handling of jury selection was inadequate, and even now his only complaint about the jury selection process is that one potential juror was excused for cause after he gave an equivocal answer to the question whether he would follow the court's instruction about constructive possession of drugs. See Jan. 6, 1989, Tr. 26. That ruling, however, was manifestly correct and could not have affected petitioner's right to an unbiased jury.[9]

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[9] The juror in question told the magistrate that a close friend of his had been convicted of purchasing cocaine and that he felt his friend "got a raw deal" because he was charged with possessing drugs that belonged to someone else. Jan. 6, 1989, Tr. 22-23. When the magistrate asked the juror whether, in light of his friend's experience, he would have any hesitancy in following the court's instructions on con-

There are, of course, limits to the extent to which a court may delegate criminal trial functions to unauthorized persons. Even if it were done without objection from the parties, delegating to a visiting high school civics class the task of ruling on objections, instructing the jury, and imposing sentence would be plain error, since such a flagrant departure from traditional procedures would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). But the same cannot fairly be said of the assignment of magistrates to conduct jury voir dire. Magistrates are judicial officers who perform a variety of functions in aid of Article III judges, including, with the consent of the parties, conducting civil and misdemeanor criminal trials. See 18 U.S.C. 3401; 28 U.S.C. 636(b) and (c). While we now know that magistrates are not authorized to conduct felony jury selection, that degree of participation by a magistrate in felony trials is not so incongruous or inconsistent with common notions of procedural regularity as to undermine the integrity and public reputation of the federal criminal courts.

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structive possession, the juror said, "Well, if there is any relationship to that, I don't know what comes out of this. If there is any relationship to that, I may go back to it." *Id.* at 26. The magistrate concluded that the juror had in effect "suggested to me that he'll not admit to following the instructions of the Court." *Ibid.* The decision to excuse that juror for cause was perfectly appropriate, and it is hardly surprising that petitioner's counsel made nothing further of the point before the district court.

2. An error is not necessarily plain simply because a court has held that the error can never be harmless

The Court in *Gomez* held that the delegation of jury selection to a magistrate can never be dismissed as harmless error, see Fed. R. Crim. P. 52(a). *Gomez*, 490 U.S. at 876. The Court's determination that a *Gomez* error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests. The harmless error rule protects rulings in criminal cases from attack on inconsequential grounds and therefore ordinarily requires a reviewing court to find prejudice to the defendant before overturning the ruling in question. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make his wishes known with respect to a particular ruling, and at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney.

Because of the different policies served by the two doctrines, an error that is non-harmless is not necessarily "plain." An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since the concern for the fairness of the proceedings must be balanced against the strong policy interests requiring a claim of error to be brought to the atten-

tion of the district court in time for the error to be avoided or corrected.

The Court has identified several classes of errors that are not subject to harmless error analysis.[10] But that does not mean that such an error must result in reversal if the defendant fails to call it to the district court's attention. A ruling that harmless error analysis is inapplicable to a particular error rests on the difficulty of assessing whether the practice at issue causes prejudice, not on the conclusion that the practice results in prejudice to the defendant in every case. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Thus, the Court's decision in *Gomez* that harmless error analysis does not apply when a magistrate picks a jury does not mean that petitioner was prejudiced by the magistrate's role at his trial. By contrast, the plain error standard requires a showing of substantial prejudice, which petitioner cannot make.[11]

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[10] See, *e.g.*, *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose* v. *Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis).

[11] The courts of appeals that have considered the relationship between the harmless error and plain error standards have suggested that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

The distinction between harmless error and plain error analysis is clearest with respect to errors that have the potential to be highly prejudicial but which the defendant, in particular settings, may wish to let pass, or even welcome. An erroneous ruling cannot be considered plain error where the defendant may have good reason not to resist it.

An example from the arena of Eighth Amendment law may illustrate this point. In *Turner* v. *Murray*, 476 U.S. 28 (1986), the Court adopted a per se rule that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The Court's rule apparently would not allow a finding of harmless error in any case in which the defendant requested the inquiry. Because it recognized that defense counsel might prefer not to broach the subject of racial prejudice, however, the Court held that the defendant would be entitled to the inquiry only upon request. *Id.* at 37 & n.10. Thus, omission of the inquiry upon request could not be harmless error; if the defendant made no request, however, the omission would not constitute plain error.

The legal issue presented in this case is closely analogous. The fact that harmless error principles do not apply to a *Gomez* error does not mean that a defendant should be free to raise such an error on appeal without having preserved an objection in the district court, particularly where, as here, the defendant expressly chose to proceed with magistrate-conducted voir dire.

Petitioner evidently had reasons to prefer the procedure employed at trial. And there is no reason to question the wisdom of petitioner's choice. Unlike many situations involving rulings that are almost certainly unfavorable to the defendant, the assignment of voir dire to a magistrate is not inherently more likely to help the prosecution than the defense. This issue is therefore one in which the absence of objection is best explained not by oversight, but by tactical preference or indifference. In our view, it makes little sense in such a case to adopt a rule of automatic reversal, regardless of the position taken by the defendant in the district court.

3. *The magistrate's lack of "jurisdiction" to conduct voir dire does not render the assignment of voir dire to the magistrate plain error*

Petitioner argues that the Court in *Gomez* in effect held error of the sort in this case to be cognizable under the plain error rule, because it characterized the error as relating to "jurisdiction." See *Gomez*, 490 U.S. at 876 (referring to "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to proceed"). The Court's use of the word "jurisdiction" in *Gomez*, however, does not advance petitioner's plain error argument.

The word "jurisdiction" is a "many-hued term." *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 110 S. Ct. 3283 (1990). As the Seventh Circuit noted in *Wey*, "*Gomez* used the word 'jurisdiction' in a context revealing that the court meant 'authority.'" 895 F.2d at 431. That is, the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also

United States v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional").

As petitioner acknowledges (Br. 40), the district court did not lose subject matter jurisdiction over this case by erroneously delegating jury selection to a magistrate. Subject matter jurisdiction is lacking when the court cannot issue a binding judgment on the subject. *Insurance Corp.* v. *Campagnie des Bauxites*, 456 U.S. 694, 701 (1982); Restatement (Second) of Judgments § 11 (1982). There is no doubt in this case that the district court had jurisdiction to adjudicate the charges against petitioner and enter a judgment against him. See 18 U.S.C. 3231. Whether the district judge or the magistrate presided "during jury selection does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute." *United States* v. *Wey*, 895 F.2d at 431; accord *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); see generally *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986). Accordingly, the trial court's error in delegating jury selection to a magistrate was not a "jurisdictional" error of the sort that may be raised at any time (or noted by the court *sua sponte*) and requires reversal of the judgment whenever it is noticed.

C. Article III Does Not Require That Petitioner Be Granted Relief In Spite Of His Consent To The Magistrate's Role In Selecting The Jury

Petitioner makes a two-part argument with respect to Article III of the Constitution. First, he argues that magistrate-conducted voir dire violates Article III, because it delegates the "judicial Power" to an officer who does not enjoy the tenure and salary protections of an Article III judge. Second, he argues that a violation of Article III, at least in the present context, constitutes automatic reversible error and is not subject to waiver. We believe that petitioner is wrong on both portions of his argument. If he is to prevail, however, he must be correct on both contentions.

At the outset, it is important to note the breadth and implications of petitioner's position. If petitioner is correct in his view of the restrictions imposed by Article III on the use of magistrates, far more is at stake than magistrate-conducted voir dire in felony jury trials. The authority of magistrates, on consent, to conduct misdemeanor trials or even to conduct voir dire in misdemeanor cases would be at risk, since nothing in Article III distinguishes between misdemeanors and felonies. Moreover, while petitioner refrains from questioning the validity of the waiver of the right to trial by an Article III judge in civil cases, see Br. 34-35 n.19, he provides no analytical basis for applying different set of principles in civil and criminal cases.[12] Article III does not define the "judicial

[12] The following example may show how contrived is petitioner's effort to distinguish between felony cases and all other types of federal judicial proceedings. Suppose a criminal defendant was charged in the same indictment with both felonies and misdemeanors. Suppose further that the defendant consented to have his jury selected by a magistrate. Under petitioner's view, it would appear that the defendant would be entitled under Article III to have his felony counts reversed, but would have his misdemeanor counts upheld, even if the sentences imposed on both sets of counts were identical, and even though the same jury heard the evidence and returned verdicts on both sets of counts.

Petitioner asserts that the distinction between felony cases and all others is justified by the greater importance of felony cases and the fact that Article III guarantees a right to a jury trial in felony cases. The jury trial right, however, has nothing to do with whether particular cases are within the "judicial Power." In any event, the line between felonies and misdemeanors is different from the line between cases in which a jury trial is available and those in which it is not. Moreover, petitioner's effort to invoke the relative "importance" of felony prosecutions is an entirety unsatisfactory basis for distinguishing between cases in which magistrates may participate in trials by consent and those in which they may not. Besides the absence of any textual basis for such a "standard," the amorphous nature of the "importance" test is an invitation to chaos. It is certainly possible to imagine civil cases that are more important to the parties, and to the community as a whole, than some felony cases might be, yet petitioner contends that because of the importance generally attached to felonies, Article III *never* permits a magistrate to conduct jury selection in a felony case, while it *always* permits a magistrate to conduct jury selection, with consent, in misdemeanor and civil cases.

Power" differently for felony cases than for all other proceedings that fall within federal jurisdiction. Magistrates participate in or try a large number of misdemeanor and civil cases each year,[13] and in those cases the magistrates typically do not just select the juries, but conduct the full trials. It is hard to say,

[13] Petitioner cites statistics showing that in the year ending July 30, 1990, magistrates tried 4,958 civil cases and 13,248 misdemeanor cases, and disposed of an additional 87,682 petty offense cases. Pet. Br. 36.

therefore, that district courts exercise "meaningful review" of the magistrates' conduct in those cases but not in the case of felony jury selection. Accordingly, if petitioner is correct that Article III requires a district court to conduct jury selection regardless of the consent of the parties, the consequence may be that district courts must conduct every civil trial, preside over every misdemeanor trial, and hear every proceeding involving a traffic ticket issued on federal property. Fortunately, Article III is not so rigid as to require such a sweeping and burdensome revolution in the way civil and misdemeanor cases are handled.

1. *The magistrate's conduct in this case did not violate Article III*

As this Court has explained, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986). In particular, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III.").

While Congress has substantial freedom to assign particular matters for adjudication by bodies other than Article III courts, that authority is not unlimited. This Court has identified two instances in which congressional delegation of a judicial function to non-Article III officers transgresses Article III:

first, where that delegation violates a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government," *United States* v. *Will*, 449 U.S. 200, 218 (1980); and second, where the delegation intrudes on "the role of the independent judiciary within the constitutional scheme of tripartite government," *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); see *Schor*, 478 U.S. at 848. Magistrate-conducted voir dire, however, does not fall within either of those categories.

a. In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case. The Court held that the delegation of suppression hearings to a magistrate "does not violate Art. III so long as the ultimate decision is made by the district court." *Id.* at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction," and that "the magistrate acts as subsidiary to and only in aid of the district court." *Id.* at 681. Justice Blackmun, concurring, reiterated that because the magistrate is subject to the control of an Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685. Thus, whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the errors." *Id.* at 686.

Petitioner argues that Article III was violated in this case because the procedures of the Magistrates Act did not guarantee sufficient review of the magis-

trate's conduct at the jury selection proceeding. The question here, however, is not the constitutionality of the Magistrates Act, but the constitutionality of the particular jury selection procedure used in this case. Thus, if petitioner had requested review of one of the magistrate's rulings and the district court had conducted a searching and careful review of that ruling, the question would be whether that review was sufficiently meaningful to satisfy Article III. Because petitioner did not request any review at all, his Article III claim would have force only if the magistrate's conduct could not have been subject to effective review or control by the district court. That was not the case here.

As in *Raddatz*, the magistrate's role in this case was "subsidiary to and only in aid of" the court. 447 U.S. at 681. A magistrate is a member of the Judicial Branch and is subject to the control of Article III judges. The district judge in this case was free to refuse to assign jury selection to the magistrate, or he could have given the magistrate detailed instructions or a very limited mandate if the parties had requested. Moreover, the parties were free to raise with the district court any objection they might have to the magistrate's rulings. The "ultimate decision" with respect to the jury selection process was the decision whether to empanel the jury. And that decision clearly remained with the district court.[14]

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[14] Petitioner contends in passing (Br. 29 n.12) that if a magistrate conducts voir dire, he holds his office in violation of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, because an officer who performs such a function must be a principal officer of the United States who must in turn be appointed by the President and confirmed by the Senate. Magistrates, however, act under the direction and supervision of the district courts, and for that reason have always been regarded as "[i]nferior officers" that Congress "may allow to be appointed * * * by the Judiciary." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 342 (1931); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901). If magistrates are "inferior Officers" when they try civil cases and conduct misdemeanor trials, it makes little sense to say that they become principal officers when they participate in a felony proceeding to the extent of presiding over jury selection.

After completion of the magistrate-conducted voir dire, the district court asked petitioner and the government about any "outstanding matters," J.A. 7, and asked "can we proceed with the jury" that the parties and the magistrate had selected, *id.* at 9. Receiving no complaints about the magistrate's supervision of the jury selection or the qualifications of the jurors selected or excused during voir dire, the district court ordered the clerk to "[s]wear [the jurors] in and get started." *Ibid.* The record thus refutes petitioner's assertion that "the judge in [his] trial did not offer to [review the magistrate-conducted voir dire]." Br. 24; see *id.* at 29 ("Nor, in the end, did the district judge conduct any review before swearing in the jury and beginning to receive testimony."). The district court conducted no review because no one asked for it.[15]

Petitioner relies heavily (Br. 24-27) on the Court's statement in *Gomez* that it "harbor[ed] serious doubts that a district court could review [magistrate-conducted voir dire] meaningfully." 490 U.S. at 874. Although we recognize that a district court's review

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[15] Given the availability of constitutionally adequate review by the district court in this case, petitioner errs in contending (Br. 28-29) that the Magistrates Act's failure to provide expressly for such review renders the proceedings in this case violative of Article III.

will not easily capture "the atmosphere of the *voir dire*," *id.* at 875, that is not to say that magistrate-conducted voir dire invariably results in an irreparable distortion of the jury selection process, or that it did so in this case.

To begin with, jury selection often produces no issue needing review, as both sides are often satisfied with the process. This appears to be such a case, since the parties made no objection before the district court to the substance of the voir dire or to the magistrate's decision to seat or excuse particular jurors. In addition, although voir dire requires the court to "scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality," *Gomez*, 490 U.S. at 875, that factor becomes important only if there is a dispute about the rulings made by the officer who presided at jury selection. Here, most of the magistrate's rulings consisted of excusing prospective jurors when, in response to questions, they acknowledged their inability to be impartial. See, *e.g.*, Jan. 6, 1989, Tr. 39-40, 40-41, 50-52, 54-55, 68-69. As we have noted, the only ruling that petitioner objected to before the magistrate was the magistrate's decision to strike for cause a juror who expressed resentment over the drug prosecution of a close friend and gave equivocal answers when asked whether he could abide by the court's instructions. See pp. 19-20 & note 9, *supra*. The magistrate's ruling on that juror was manifestly correct, and it is not surprising that petitioner did not pursue that matter before the district court.

There was likewise no controversy regarding the parties' exercise of their peremptory challenges in this case. One of the important functions of voir dire is to allow the parties to hear the prospective jurors' responses and to exercise peremptory challenges based

on those responses. Like the magistrate's rulings on excuses for cause, the questions that the magistrate asks of the jury panel can be reviewed on the record or on the parties' motions to have particular questions asked. Petitioner did not object to any question posed by the magistrate or request any additional questioning. Again, therefore, there was nothing for the district court to review. But even if such an objection had been made, the magistrate's determination to ask or not to ask a particular question of the prospective jurors could have been reviewed by the district court either in advance or after the fact.

If a need had arisen for the district court to review the magistrate's conduct of voir dire, the district court could have handled the matter in a variety of ways. For example, if the magistrate had refused to ask particular questions that the parties submitted, the district court could have reviewed that issue before voir dire began. Other objections could have been reviewed immediately after the fact or even during the course of the voir dire, either based on the parties' representations or based on the transcript of the court reporter's notes.[16] If necessary, the judge could have questioned a particular prospective juror himself, either immediately after the magistrate's voir dire or even during the course of jury selection.[17] And if the judge had been left in

[16] In this case, as petitioner points out (Br. 2 n.2), the trial judge did not order or review the voir dire transcript. Because petitioner did not object to the substance of the voir dire, including the jurors selected and excluded, the district court can hardly be faulted for failing to order and review the transcript.

[17] In *Gomez*, the Court noted that "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at

doubt as to the impartiality of the jury selected by the magistrate, the judge could have commenced the jury selection anew.

In sum, the district court in this case had a variety of means available through which he could have exercised control over the magistrate's conduct of the jury selection process if he had been asked. The magistrate's work was therefore sufficiently subject to the district court's "control and jurisdiction," *Raddatz*, 447 U.S. at 683, to be consistent with Article III. By focusing on the absence of any actual exercise of control over the magistrate in this case, petitioner has confused the *need* for review, of which there was none in this case, with the court's *ability* to conduct review, for which the court had a variety of devices that it could have invoked if the need had arisen.

b. Petitioner's invocation (Br. 30-37) of the separation-of-powers concerns sometimes raised by Article III claims is wide of the mark in the setting of this case. A district court's decision to assign jury selection to a magistrate does not entail any of the separation of powers concerns that this Court addressed in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Schor*, *supra*. A magistrate is an Article III officer who is subject to appointment, removal, and supervision by Article III judges. 28 U.S.C. 631. Moreover, the courts have never been required to assign any task

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trial." 490 U.S. at 875 n.29. That observation, however, was made only in the context of explaining why Congress may not have intended in the Magistrates Act to authorize delegation of voir dire to magistrates. The Court's statement did not address the validity of magistrate-conducted voir dire for purposes of Article III.

to a magistrate; instead, courts have been afforded the choice whether to make such assignments, and they reserve the authority to revoke those assignments at any time. This is therefore not a case of a "congressional attempt[] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. For that reason, the assignment of jury selection to a magistrate does not amount to a "structural" constitutional violation that transcends the rights of individual litigants. Cf. *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc) (upholding consensual assignment of magistrates to try civil cases, over a claim that the assignment resulted in a structural Article III violation), cert. denied, 469 U.S. 824 (1984).

Petitioner nevertheless argues that having a magistrate preside at voir dire may cause "[a]n erosion of public acceptance of judicial proceedings," since "the public is less likely to respect the outcome where an assistant of the district judge has presided." Br. 35. This is fanciful. Petitioner cites no evidence to support his claim that public confidence in judicial proceedings depends on the presence of an Article III judge throughout the proceedings (or that jurors approach jury selection less seriously when a magistrate conducts voir dire), and those propositions are certainly not intuitively obvious.

To be sure, a judicial officer brings to judicial proceedings, including voir dire, a sense of solemnity that would be absent if the proceedings were conducted by lawyers alone, or perhaps even if the clerk of the court presided. But it is hard to credit the claim that having a United States magistrate, rather than a district judge, conduct voir dire will ma-

terially affect the venire or the public's confidence in the system of justice. After all, both the judge and the magistrate are judicial officers, and both are likely to perform the judicial task at hand with equal solemnity. For that reason, it is not plausible to argue that the assignment of jury selection to a magistrate violates Article III on the ground that it allows Article III judges, solely for administrative convenience, to undermine public confidence in the judicial system, thereby weakening the Judicial Branch in a manner inconsistent with the purpose of Article III.

2. *An Article III right of the sort claimed by petitioner is subject to waiver*

Even if the Court were to conclude, contrary to our submission, that Article III gives a defendant a right to have a district court preside over jury selection, petitioner would not be entitled to relief. This Court has made clear that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are the other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-849; see, *e.g.*, *Garner* v. *United States*, 424 U.S. 648. 654 n.9 (1976) (defendant can waive Fifth Amendment right to be free from compulsory self-incrimination); *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972) (defendant can waive right to a speedy trial); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (defendant can waive right to counsel).

In *Schor*, the Court concluded that "[t]o the extent [the] structural principle [of Article III] is implicated in a given case, * * * notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U.S. at 850-851. Petitioner, however, may not invoke the *Schor* exception to waiver for structural Article III principles because, as we have noted, district court assignments of certain judicial responsibilities to magistrates are the products of an intra-branch distribution of responsibilities, not "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. Because a district court's assignment of certain tasks to a magistrate has nothing to do with "the encroachment or aggrandizement of one branch at the expense of another," *Schor*, 478 U.S. at 850, quoting *Buckley* v. *Valeo*, 424 U.S. at 1, the only Article III value at issue—assuming that magistrate-conducted voir dire violates Article III—is "preserv[ing] to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States." *Schor*, 478 U.S. at 850. And that is the purely private interest that *Schor* holds may be waived.

D. Petitioner's Waiver Was Valid Even Though The District Court Did Not Obtain His Personal Consent On The Record

Petitioner's final contention is that even if it was possible for him to waive his right to have the district court conduct the jury selection, any waiver was invalid absent petitioner's personal consent on the record. Because petitioner gave his consent through his attorney rather than personally—in

writing or in a colloquy with the court—he contends that the waiver must be disregarded.

Contrary to petitioner's assertion (Br. 40-47), a party can waive or forfeit his personal right to have an Article III judge conduct a particular proceeding, just as he can waive most other constitutional rights, merely by taking actions inconsistent with an assertion of the protection afforded by the Constitution. See *Schor*, 478 U.S. at 848-849; *Garner*, 424 U.S. at 654 n.9 ("an individual may lose the benefit of the privilege [against compulsory self-incrimination] without making a knowing and intelligent waiver").

This Court has recognized that, as a constitutional matter, "the accused has the ultimate authority to make certain fundamental decisions regarding the case," such as to whether to be represented by counsel, whether to plead guilty, and whether to waive a jury. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).[18] Nonetheless, the number of such decisions that must be made on the record by the defendant is very small; the requirement of personal, informed consent by the defendant as a precondition to the effective waiver of trial rights is very much the exception rather than the rule, and the exceptions all involve decisions that have sweeping implications for the litigation.

With respect to most rights of the defendant in the criminal justice process, the defendant's attorney is

[18] Statutes and rules require the personal consent of the party as a precondition of the valid waiver of certain other rights. The rules that go beyond the few rights in which this Court has required personal consent for a valid waiver—the right to counsel, the right to a trial, and the right to a trial by jury—are not constitutionally compelled.

authorized to make tactical decisions that result in forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. As this Court recently explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function if every tactical decision required client approval.

Taylor v. *Illinois*, 484 U.S. 400, 417-418 (1988) (footnote omitted). "Under our adversary system," the Court has stated, "once the defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Faretta* v. *California*, 422 U.S. 806, 820 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas").

The decision whether to proceed with magistrate-conducted voir dire is not the sort of "fundamental" trial decision that the defendant must make personally. Compare *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit, without personal consent, the right not to have members of the venire excluded because of their attitudes toward capital punishment). Decisions such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury trial are issues that pro-

foundly affect the form of the proceedings, and in that respect they are fundamentally different from a decision such as whether to consent to magistrate-conducted voir dire.

Petitioner argues (Br. 45) that consent to magistrate-conducted voir dire is a "blanket" waiver akin to the waiver of rights that accompanies a plea of guilty. But the suggestion that the waiver of rights involved in consenting to magistrate voir dire is equivalent to the waiver of all of the defendant's trial rights that results from a plea of guilty is a gross overstatement. In fact, there is nothing distinctive about the waiver of the right to the presence of a judge during jury selection that distinguishes it from the myriad trial rights that a defendant can forfeit without any expression of personal, informed consent.

For example, counsel may decide, as a tactical matter, not to cross-examine a key witness against the defendant, or even to refrain from cross-examining any of the government's witnesses, relying instead on a technical defense that does not go to the merits of the government's case. There is no requirement that the defendant be consulted about that decision or that he be apprised of the benefits and risks of cross-examination to make an informed decision whether to waive that right. Similarly, counsel may bind the defendant by deciding not to seek suppression of physical evidence that may be the only evidence against the defendant; there is no requirement that the defendant give an informed, on-the-record consent to that decision, even though the decision may dramatically affect all aspects of the proceedings against him.

That is certainly a sensible result. To impose a requirement of personal and informed consent with

respect to every instance in which a defendant forgoes a possible constitutional claim, or a claim that would significantly affect the proceedings as a whole, would make trials impossibly cumbersome as well as rich spawning grounds for claims of reversible error. Because the waiver of a right to have a district court conduct voir dire is more akin to the waiver of the right to cross-examine a particular witness than it is to the waiver of the right to counsel or the right to a trial, petitioner's consent, expressed through his counsel, should be accorded binding effect in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Article III of the United States Constitution provides in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.
>
> * * * * *
>
> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury * * *.

Title 28, United States Code, Section 636, provides in pertinent part:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section

3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a

judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging the conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

> (1) Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. * * *
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

* * * * *

Rule 51 of the Federal Rules of Criminal Procedure provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice the party.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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No. 90-615

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OCTOBER TERM, 1990

RAFAEL PERETZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent's brief acknowledges that Congress, which has sole authority under Art. III to determine a magistrate's jurisdiction, precluded magistrates from presiding at felony voir dire regardless of the parties' consent. Having conceded that there was a substantive error—and thus sidestepping two of the three questions the Court had directed the parties to address [1]—respondent nevertheless attempts to salvage its case by wrongly blaming petitioner for not lodging a contemporaneous objection. But respondent's theory that this is a "plain error" case has a gaping flaw: plain error analysis only applies where

[1] The two questions were whether the delegation violated the Federal Magistrates Act and, if not, whether it violated Art. III.

an issue is otherwise unpreserved for appeal. Here, the error is preserved for appeal for three reasons:

I. The district court failed to comply with the *Johnson v. Zerbst*, 304 U.S. 458 (1938), "knowing, intelligent and voluntary" waiver standard explicitly adopted by Congress for magistrate trials in misdemeanor and petty offense cases. Congress did not expressly adopt this stringent standard for felonies only because Congress completely precluded *any* felony trial jurisdiction for magistrates. At the very least, the Court should hold that a defendant's right to appeal in a felony case is preserved absent compliance with the statutory waiver requirement for less significant misdemeanor and petty offense cases.

II. By "exceed[ing] his jurisdiction," *Gomez v. United States*, 490 U.S. 858, 876 (1989), the magistrate violated Art. III's express reservation for Congress of the responsibility to create and to define the jurisdiction of the lower federal courts and its officers. Congress precluded consent felony trial jurisdiction for magistrates "in the interests of policy as well as constitutional constraints," *id.* at 872, but the magistrate here exercised it anyway at the district court's behest. This was a clear "structural" violation that petitioner may raise on direct appeal regardless of his position below.

III. As we argued extensively in Point II of our opening brief, an individual criminal defendant cannot "waive" structural and societal interests underlying Art. III's textual requirement that the "judicial Power" be exercised by fully-independent Art. III judges. Respondent's proposed case-by-case test for evaluating whether a structural violation has occurred would negate Art. III altogether by permitting delegation of entire felony trials to magistrates, law clerks, even citizens off the street, so long as no discrete error identified by a party at trial goes "uncorrected." It also disregards the recognition in *Gomez* that voir dire is inherently immune from independent or *de novo* review.

The effect of the error that concededly occurred in this case can be corrected without undermining the jurisdiction of magistrates to preside at civil and misdemeanor trials. A conclusion that the error requires a new trial because the magistrate, as in *Gomez*, "exceeded his jurisdiction," or because petitioner did not validly waive his right to have a district judge preside at voir dire, would leave for another day the more vexing question whether Congress has the inherent power under Art. III to authorize such a delegation. Under existing *res judicata* and retroactivity principles, neither of the above holdings would require collateral relief for defendants whose convictions became final before *Gomez* was decided in June 1989. Even a broader holding that magistrate-conducted felony voir dire is an inherent Art. III violation would not require the same result for misdemeanor or civil trials. *See infra* at 14-15 n.8.

ARGUMENT

I. RESPONDENT'S BRIEF IGNORES AND WOULD NEGATE CONGRESS' EFFORT TO ESTABLISH WHEN AND BY WHAT STANDARD A DEFENDANT'S RIGHT TO THE PRESENCE OF A DISTRICT JUDGE AT TRIAL MAY BE WAIVED

Respondent concedes that Congress may impose a waiver procedure or standard that is stricter than the Constitution would require. *See* Brief for United States 38 n.18 ("Statutes and rules require the personal consent of the party as a precondition of the valid waiver of certain other rights . . . that go beyond the few rights in which this Court has required personal consent for a valid waiver . . ."). Consistent with this view, the lower courts have held that a litigant's waiver that fails to substantially comply with the Magistrates Act's consent requirements cannot preclude the litigant from complaining on appeal. *See* Pets. Brf. 40 n.22.

Respondent's brief totally ignores the significance of Congress' incorporation into the Magistrates Act of the *Johnson v. Zerbst* waiver standard, with an additional writing requirement, for misdemeanor and petty offense trials. *See Gomez*, 490 U.S. at 870 ("the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"); 18 U.S.C. § 3401; Pets. Brf. 41-42. While Congress set up no felony waiver procedure because it had forbidden magistrates from exercising felony trial jurisdiction altogether, it defies logic to suggest that Congress would have been content with a looser test for felonies than for petty offenses. *See United States v. Martinez-Torres*, 912 F.2d 1552, 1556 (1st Cir. 1990) (en banc) ("The statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negates waiver, even oral consent, by counsel for an uninformed defendant in a felony case."). To the contrary, by completely precluding magistrates from ever exercising consent trial jurisdiction over felonies, Congress made a felony defendant's right to the presence of an Art. III judge immune from waiver. However, the Court need not reach this issue, since respondent does not argue that petitioner's counsel's oral "waiver" satisfied even the *Johnson v. Zerbst* standard.

Respondent's all-out effort to convince this Court to employ the plain error rule simply ignores that the waiver standard can be no less stringent in this felony case than Congress decreed for petty offenses. Additionally, even absent Congress' establishment of an appropriate waiver standard, application of *Johnson v. Zerbst* to judge-conducted voir dire is mandated by the fundamental structural nature of the right. Thus, the Court unanimously recognized in *Gomez* that the "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," including voir dire, is "basic." 490 U.S. at 876. *Cf. Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (April 1, 1991) (an "irregularity"

in the selection of the jury "may pervade all the proceedings that follow"). It is too late for respondent to maintain that the right to the presence of an officer with "jurisdiction to preside" is no more significant than the tactical decision by counsel during trial to forego cross-examination of a particular witness. Brf. 41; *see* discussion in Pets. Brf. 43-44. Even *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), upon which respondent relies (Brf. 13-14), premises its plain error analysis upon the presence of "the judge . . . on the bench."

The above analysis also defeats respondent's "invited error" argument. None of the cases respondent cites involve the types of rights that must be affirmatively waived by a criminal defendant personally, but rather attorneys' tactical decisions during trial by which clients traditionally are bound.[2]

No matter how often respondent characterizes trial counsel's "consent" as a shrewd ploy to plant or to "invite" reversible error and attributes that ploy to petitioner, its argument rings false. The trial court's request for counsel's consent made plain the Court's desire to refer jury selection to a magistrate. We already have shown, and respondent does not contest, that at the time of the request, October 14, 1988, the Second Circuit did not recognize the "right" to have a judge preside, and the district courts' practice was to override defendants' objections. In view of those circumstances, counsel's ingratiating response should be seen as an attempt to make the best of the situation since, contrary to respondent's argument (Brf. 16), the district court almost cer-

[2] The lower court cases relied on stand for the unremarkable proposition that, in evidentiary matters over which the trial court has broad discretion, certain unilateral statements by the defense permit the prosecution to use or respond with evidence that otherwise might not be admissible. Here, the suggestion that a magistrate conduct the voir dire came from the judge himself, and involved a structural, not an evidentiary, error.

tainly would *not* have respected counsel's choice.[3] Had counsel been thinking of making an appellate record, he would have shrugged or simply responded, "Yes"; he would not have made a remark so quotable that it appears countless times in respondent's brief. In any event, the government shares responsibility with the district court for failing to ensure that this foreign-born, non-English-speaking criminal defendant understood the then-unrecognized "right" his attorney was waiving.[4]

II. RESPONDENT FAILS TO DISTINGUISH THE NUMEROUS CASES HOLDING THAT A LITIGANT ON DIRECT APPEAL MAY RAISE A JUDICIAL OFFICER'S VIOLATION OF CONGRESSIONAL LIMITATIONS ON THE OFFICER'S JURISDICTION

Whether a federal tribunal has subject matter jurisdiction requires a two-step analysis:

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by [1] Article III of the Constitution and [2] the statutes enacted by Congress pursuant thereto.

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[3] *Gomez*, in which the defendants' objection was overridden, illustrates this point, as does the jury selection transcript in another case, *United States v. Ming Hoi Wong*, 88 Cr. 93 (JMM) (E.D.N.Y.) (Dec. 12, 1988). The transcript, which is appended to petitioner Peretz's appendix in the court of appeals, shows that the magistrate asked if the defendant had "any objection to my picking the jury?", and when counsel then did object, the magistrate, despite being aware of the pending *cert.* petition in *Gomez*, conducted the voir dire anyway. *See* Appendix for Appellant 45. Significantly, the magistrate whose evident policy it was to seek consent solely to make an appellate record, and to then conduct the voir dire regardless of the defendant's response, was the Chief Magistrate of the Eastern District of New York.

[4] Respondent speculates that "petitioner" may have realized that "[a] particular magistrate" might have been more favorable to him than the district judge. Brf. 5. However, at the time counsel initially agreed to the delegation, no one knew which of the numerous magistrates sitting in the Eastern District of New York ultimately would receive the assignment nearly two months later.

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). *See* discussion in Pets. Brf. 38-39.

It is *at least* true, as the government concedes (Brf. 24), that "the district court had no authority under the Magistrates Act to refer jury selection to a magistrate." But it is also true that, in exercising such "authority" after it had been unlawfully "delegated," the magistrate asserted "jurisdiction" over the subject matter of petitioner's felony trial.[5] Even if Art. III would have permitted Congress to empower magistrates to exercise this historic Art. III function, a proposition we dispute in Point II of our opening brief and *infra* at Point III, Congress did not do so. Thus, at the very least, the second prong of the *Bender* two-part test was not satisfied. The district court's delegation of power, and the magistrate's assertion of it, exceeded statutory authority and therefore violated Art. III.

Respondent argues that the above jurisdictional error did not deprive the district court of subject matter jurisdiction over the balance of the case, and that therefore it had power to enter a binding final judgment. Brf. 25. But whether such a judgment would be binding upon a defendant whose conviction became final long ago is a far broader issue than whether petitioner may raise the defect on direct appeal, when *res judicata* concerns are not present.[6]

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[5] Respondent's effort to distinguish between the terms "jurisdiction" and "authority," and to suggest that the Court, when it used "jurisdiction," somehow meant "authority," makes no sense. "Criminal jurisdiction" is "the *authority* by which judicial officers take cognizance of and decide criminal cases." Black's Law Dictionary (4th ed. rev. 1968) (emphasis added). The terms, in this context, are synonomous.

[6] Contrary to respondent's erroneous statement (Br. 25), we did not concede at page 40 of our opening brief that the district court retained subject matter jurisdiction to issue a binding judgment as a consequence of the serious jurisdictional error that occurred dur-

In *Glidden Company v. Zdanok*, 370 U.S. 530 (1962), an obviously relevant case that our opening brief raises and respondent ignores, Justice Harlan's opinion reached the merits of claims that non-Art. III officers had improperly participated in the determination of cases properly before Art. III tribunals, even though the complaining parties had not objected below.[7] As in this case, the *Glidden* petitioners alleged that non-Art. III officers had improperly adjudicated matters over which the delegating Art. III courts unquestionably had subject matter jurisdiction. In determining to reach the merits, the Court focused on whether the challenged judicial officer had improperly exercised Art. III judicial power, not on the Art. III jurisdiction of the court that had made the delegation. As Justice Harlan explained:

> [W]hen the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. . . .
>
> The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of *res judicata*, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.

Id. at 535-36 (citation omitted). *See Lamar v. United States*, 241 U.S. 103, 117-18 (1916) (petitioner's claim that intercircuit judicial assignment had violated presidential appointing power under Art. II, § 2 was permitted to be raised for the first time in a supplemental brief in the Supreme Court) (favorably cited in *Glidden*); *McClaughry v. Deming*, 186 U.S. 49, 66 (1902) (objection to an improperly constituted military tribunal could be raised initially on appeal.

The violation of the Magistrates Act that occurred in the present case obviously implicates "a strong policy concerning the proper administration of judicial business." *Glidden, supra.* The improper practice of using magistrates to conduct felony voir dire with litigant "consent" became widespread in part because the courts of appeal declined to decide the issue wherever the appellant had failed to object. *See, e.g., United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984); *United States v. Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983). Unless a party such as petitioner is permitted to raise such a claim on appeal, the appellate courts cannot ensure "the proper administration of judicial business."

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ing the trial of this case. *See, e.g., Burnham v. Superior Court*, 110 S. Ct. 2105, 2109 (1990) (traditionally a proceeding " 'before a person not a judge' . . . was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*") (emphasis in original). We merely observed that the Court does not have to find the judgment to be void to permit petitioner to appeal the jurisdictional error that occurred during voir dire. Moreover, as we suggested in our opening brief, this Court's repeated invocation of the interest of finality in litigation, which is especially strong in criminal cases, might well lead this Court not to allow non-objecting defendants whose convictions were final at the time *Gomez* was decided to obtain collateral relief. *See* Pets. Brf. 40 n.21; *Glidden Company v. Zdanok*, 370 U.S. 530, 535-36 (1962).

[7] While Justice Harlan wrote for a plurality of three, the other four justices who participtaed in deciding the case also reached the merits and did not question that the claimed jurisdictional error could be raised on direct appeal despite the absence of contemporaneous objection below.

Similarly, allowing petitioner to raise the error is essential to permit the Court to vindicate "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Glidden*, *supra*. In exercising its exclusive authority under Art. III to define the jurisdiction of magistrates, Congress acted "in the interests of policy as well as constitutional constraints." *Gomez*, 490 U.S. at 872 (footnote omitted). Congress concluded that the public interest in having life-tenured Art. III judges preside at felony trials was too great to entrust to individual litigants with far narrower concerns. By delegating voir dire notwithstanding this judgment, the district court negated Congress' considered judgment. Such an error clearly involves separation of powers. *Cf. Morrison v. Olson*, 487 U.S. 654, 673-76 (1988) (the Appointments Clause, Art. II, § 2, gives Congress exclusive power to authorize the appointment and to define the authority of inferior officers).

Respondent's reliance upon *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), for its structural argument clearly is misplaced. Brf. 25. In *Schor*, the complaining party had voluntarily availed itself of a specialized, non-Art. III forum *expressly created by Congress* to adjudicate a narrow class of public and related rights. The sole issue was whether Art. III permitted Congress to create such a voluntary, alternative dispute-resolution forum—the first prong of the *Bender* test—not whether, as in this case, a non-Art. III tribunal could be employed even though Congress had withheld authority from it. Moreover, *Schor* did consider the merits of the party's structural Art. III claim because, as in this case, important separation of powers issues were raised. Respondent cites no case in which the Court has declined to entertain a litigant's challenge because he had failed to object to a tribunal's violation of a statute involving subject matter jurisdiction.

Respondent's exclusive focus on the jurisdiction of the court making the delegation would completely undermine Congress' role in granting jurisdiction. Under respondent's reasoning, Congress' effort to circumscribe the jurisdiction of magistrates would be rendered futile because express statutory limitations may be overridden by a district court acting with the parties' consent. Indeed, respondent's notion of inherent judicial authority would remove the necessity of having any Magistrates Act at all. So long as a court with subject matter jurisdiction reserved for itself the ritual of formally entering the final order or judgment, it could refer any adjudicatory function to a court employee such as a magistrate or a clerk. Each such instance, in respondent's view, would be immune from appellate review—and from appellate supervision—both because the delegating court had subject matter jurisdiction and because the litigant, by "consenting," had waived his right to complain.

Respondent's brief is striking for its failure to consider whether an entire felony trial may be delegated to a magistrate without implicating Art. III structural concerns. It would be difficult to make a principled distinction between delegation of an entire trial, save the task of entering judgment, and a "critical" stage such as voir dire. However, even respondent's grudging concession that societal interests would be offended by delegating the trial to a "visiting high school civics class" (Brf. 20) undercuts its argument that no cognizable Art. III interests are involved besides those that are personal to, and therefore waivable by, the defendant.

This Court should hold that any mistaken assertion of authority over a particular subject matter by a magistrate or other officer is a jurisdictional error that a party may raise for the first time on direct appeal. While reversal would not necessarily be required where the jurisdictional violation was *de minimus*, this Court in *Gomez* refused to apply "harmless error" analysis to the use of a

magistrate to preside at felony voir dire when Congress had forbidden magistrates to perform that "critical" trial function. 490 U.S. at 876. If, as we contend, the error here is preserved for review, *Gomez* controls and petitioner's conviction must be reversed.

III. PETITIONER COULD NOT WAIVE INHERENT, STRUCTURAL ART. III INTERESTS THAT TRANSCEND THE NARROW INTERESTS OF AN INDIVIDUAL PARTY

Respondent's argument concerning the inherent Art. III structural issue raised in Point II of petitioner's opening brief—which the Court need not consider if it decides the case on the aforementioned narrower grounds —is premised upon a fallacy. Respondent, citing *Schor*, argues that a felony voir dire delegation does not affect separation of powers, which it assumes is the only non-individual interest underlying Art. III, because "courts have been afforded the choice whether to make such assignments, and they reserve the authority to revoke those assignments at any time." Brf. 35. But courts have *not* been afforded such a choice, since Congress precluded such assignments. Congress recognized that the Art. III interests at stake in a felony trial, to paraphrase respondent's brief, "transcend[] the rights of individual litigants." *Id.* Such interests, as we have shown, do not entirely coincide with the Judicial Branch's own institutional concerns. *See* Pets. Brf. 32-35.

Undeterred by the lack of statutory authority respondent advocates a case-by-case evaluation of whether the defendant asked for and received adequate district court review of discrete errors his counsel was able to identify at trial. This approach would collapse the structural and personal-right components of Art. III. In essence, the Art. III inquiry would be whether the defendant was denied due process because discrete, prejudicial error went uncorrected. Carried to its logical extreme, respondent's argument would permit a district judge to assign an entire felony trial to a magistrate. So long as the district judge was able to "correct" whatever errors the defendant was able to identify, there would be no Art. III structural violation.

Gomez rejected such an approach. It recognized that voir dire is far more than an "administrative impanelment process" at which jurors who willingly admit their biases are excused. "[N]o transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." 490 U.S. at 875. Most of what occurs at voir dire is subject neither to review nor to correction. *See* Pets. Brf. 23-29.

Even the type of objection at petitioner's trial that respondent argues could have been reviewed by the district judge—the magistrate's excusal over petitioner's objection of a juror challenged by the government for cause—proves our point. Brf. 32. Once the magistrate excuses a prospective juror, the juror would return to the jury pool and possibly be selected for another jury. Thus, it would not be possible to correct the magistrate's error. Even if available for additional questioning by the district judge, the juror surely would be placed "on the defensive." *Gomez*, 490 U.S. at 875 n.29. Additionally, the court, without being present when the magistrate evaluated the juror's appearance and demeanor, could not fairly second-guess the magistrate's decision.

Respondent advances the dubious argument (Brf. 33-34) that voir dire is adequately reviewable because a defendant may interrupt the district judge to ask for his or her immediate personal intervention to correct a magistrate's error. A felony defendant facing trial and possibly sentencing before a particular judge—in petitioner's case, a possible life sentence—would hardly seek such relief, absent an outrageous error, knowing that the judge had delegated voir dire precisely because he

was too busy or did not want to be bothered. Such a review procedure certainly would not save the judge time to devote himself to more "important" tasks.

This Court did not take a fact-specific approach in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), or in *United States v. Raddatz*, 447 U.S. 667 (1980). In both of those cases, the Court evaluated the inherent sufficiency of whatever independent review procedures were authorized by statute together with the nature and the importance of the delegated Art. III function. Such an analysis, yielding bright-line rules concerning what traditional judicial functions may be delegated to non-Art. III officers, is essential to provide guidance to Congress and to the lower courts. Contrary to respondent's argument (Brf. 26-28), lesser misdemeanor or petty offense prosecutions, or essentially private civil disputes, do not necessarily have to fall on the same side of the line as felonies.[8]

[8] Respondent (Brf. 26-27 n.12) misconstrues the position we advanced in our opening brief (pp. 34-35 n.19) concerning civil and misdemeanor trials. We did not contend that magistrates "always" may preside at such proceedings with the litigants' consent, but merely that there are reasonable grounds upon which the Court could distinguish such proceedings from felonies if it were so inclined. As reflected in the federal statutes and rules discussed in our opening brief (pp. 32-33)—and ignored by respondent—a federal judge, as a general rule, is far more involved in protecting societal interests during a government-sponsored criminal prosecution than he is while refereeing a civil dispute between private parties. Felonies are well understood to involve more serious interests than misdemeanors. *Cf. Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (the severity of punishment provided for by statute reflects the legislature's " 'judgment about the seriousness of the offense' ") (quoting *Frank v. United States*, 395 U.S. 147, 149 (1969)). The line-drawing process, "although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (drawing line at six months punishment for when trial by jury is required). The Framers overcame a parallel problem, choosing to protect the right to trial by jury in criminal but not in civil cases under Art. III, and distinguishing between felonies and misdemeanors with respect to the requirement of grand jury indictment under the Sixth Amendment.

In sum, whether this case involves a jurisdictional defect, a nonwaivable personal right, or a personal right that may be waived only under the strict *Johnson v. Zerbst* standard, petitioner may raise the error in this Court even though he lodged no contemporaneous objection. No showing of substantial prejudice must be made to obtain review on the merits since the error is reviewable without regard to the plain error rule.

CONCLUSION

Petitioner's conviction should be reversed and a new trial ordered.

Respectfully submitted,

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